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91-1927

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.
and

THE SIERRA CLUB AND THE NATIONAL AUDUBON SOCIETY, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

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Appendix B- Statutes and Regulations
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Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

Appendix A - DECISIONS FROM THE COURTS BELOW AND CLUB EASEMENT FINDING OF NO SIGNIFICANT IMPACT

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Plaintiff-Appellant,
and
Texas Water Conservation Association,
Plaintiff-Intervenor-Appellant,
v.
U.S. DEPARTMENT OF INTERIOR et al.,
Defendants-Appellees.
and
The Sierra Club and the National Audubon Society, Defendants-Intervenors-Appellees.

No. 90-4761.

United States Court of Appeals,
Fifth Circuit.

Jan. 28, 1992.

Rehearing Denied March 4, 1992.

Action was brought challenging the Fish and Wildlife Service's compliance with the National Environmental Policy Act (NEPA) in connection with proposed acquisition of conservation easement on wetlands habitat. On cross motions for summary judgment, the United States District Court for the Eastern District of Texas, Paul N. Brown, J., 745 F.Supp. 388, dismissed plaintiffs'

APPENDIX A
5th Circuit Court
January 28, 1992

claims, and plaintiffs appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) river authority and conservation association that wanted wetlands area for construction of reservoir suffered sufficient "injury in fact" from grant of nondevelopment easement to have standing to challenge acquisition of easement based on Service's failure to prepare environmental impact statement (EIS), but (2) actions of the Service in acquiring nondevelopment easement which prohibited any change in status quo did not amount to "major federal action significantly affecting quality of human environment" so as to mandate preparation of EIS.

AFFIRMED.

William H. Burchett, Christine C. Ryan, Jorden Schulte & Burchette, Washington, D.C., Earl Roberts, Jr., Roberts, Hill &

Calk, Longview, Tex., for Sabine River Authority.

Michael J. Booth, Frank R. Booth, Booth & Newsom, Austin, Tex., Ruth H. Yeager, First Asst. U.S. Atty., Tyler, Tex., Lisa Hemmer, Atty., Robert L. Klarquist, Dept. of Justice, Appellate Section, Environmental Natural Resources, Washington, D.C., for Texas Water Conservation Ass'n.

Jos. Irion Worsham, Worsham, Forsythe, Samples & Wooldridge, Dallas, Tex., for Little Sandy Hunting & Fishing Club.

Robert G. Dreher, Sierra Club Legal Def. Fund, Washington, D.C., for Sierra Club and Nat. Audubon Society.

Appeals from the United States District Court for the Eastern District of Texas.

Before GOLDBERG and GARWOOD, Circuit Judges, and BUCHMEYER,* District Judge:

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*District Judge for the Northern District of Texas, sitting by designation.

GOLDBERG, Circuit Judge:

This case is for the birds-thousands of them. And we mean that in no facetious sense.

At issue is a non-development easement on 3800 acres of land in East Texas, containing high-quality wetlands and wildlife habitat essential to migratory waterfowl. The Little Sandy Hunting and Fishing Club donated the easement to the U.S. Fish and Wildlife Service in an effort to guarantee that the wetlands would be preserved in their pristine state without the corrupting effect of commercial, agricultural, and industrial development. By accepting the easement, the Fish and Wildlife Service has thus insured that migratory birds and other wildlife can flourish there.

The Sabine River Authority and the Texas Water Conservation Association, though not unsympathetic to the plight (and flight) of

our fine feathered friends, filed a lawsuit alleging that the Fish and Wildlife Service violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, by failing to prepare an Environmental Impact Statement (an "EIS") in connection with the acquisition of the easement. When the district court dismissed their claims by way of summary judgment, *Sabine River Authority v. United States Dept. of Interior*, 745 F.Supp. 388 (E.D.Tex.1990), they appealed. We affirm.

The district court correctly dismissed the claims brought by the Sabine River Authority and the Texas Water Conservation Association, and we are hard-pressed to improve upon its scholarly work. Its survey of the relevant case law was extensive, its analysis persuasive. Rather than dilute the strength of the district court's reasoning and pollute the legal environment

with an expansive discussion of our own, we write only to express the depth of our commitment to the district court's fluid opinion. We must remediate in one area, however, filtering out the minute particles (*672) of contaminant in the district court's "standing" water.

PHASE I

Wetlands, with its swamps, marshes, bogs, mud flats and other water-dependent community types, are an ecological treasure. They play a vital role for wildlife by providing nesting and habitat for many species of fish, birds, plants and other wildlife. For the bird community, wetlands foster high species diversity, density, and productivity by providing both food and habitat, in the form of nesting sites, breeding and rearing areas, feeding grounds, and cover from predators. Office of Technology Assessment, *Wetlands: Their Use and*

Regulation, at 5-6, 30, 52 (1984). Many endangered species rely on our wetlands for their survival and reproductive success. Without the wetlands, we are all but assured of their extinction.

Beyond the direct import of wetlands to wildlife, they also serve other equally significant environmental functions. One of the more apparent is their favorable effect on our water quality. By filtering contaminants out of water before they can reach the open water, wetlands serve as nature's own water purifier. By absorbing large amounts of water, wetlands protect us from potential flooding.

As with many of our most precious natural resources, our wetlands are threatened by commercial, agricultural, and industrial development. In the last 200 years, thirty to fifty percent of our nation's wetlands have disappeared. Because wetlands are

critical to flood control, water supply, water quality, and, of course, wildlife, their rapid disappearance is setting the stage for what may eventually become a significant environmental catastrophe. The State of Texas alone has lost 8 million acres, nearly half of its original wetlands. With only some 7.6 million acres remaining, wetlands presently constitute a mere 4.4 percent of Texas' acreage. As the wetlands continue to shrink, the threat to our environment escalates.

Recognizing that our nation's wetlands are vital to the environmental equilibrium, the Fish and Wildlife Service embarked on a laudatory effort to preserve the existing wetlands. The Fish and Wildlife Service is charged with the responsibility of protecting and maintaining the population of migratory waterfowl, other wildlife resources, and endangered species. Toward

that end, it established the National Wildlife Refuge System, a project that has earned widespread approval from environmental groups. Through the Refuge System, the Fish and Wildlife Service has acquired millions of acres of environmentally rich lands, lands which are to be preserved in their natural state: no development, no mining, just mother nature's original recipe without any artificial ingredients. These lands provide a winter home to the thousands of migratory birds utilizing the "Central Flyway" and support large populations of Native North American wood ducks. U.S. Fish and Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* at 15 (1984).

Some of the land is acquired in fee simple; but since the Fish and Wildlife Service merely seeks to prohibit environmentally destructive activity on the land,

much of it is obtained in the form of leases and easements which preclude development of the land. This method proves far more economical in effectuating the goal of preventing adulteration to the lands, because the government need not buy the property and take title outright; it can accept a non-development easement-a promise by the owner to refrain from developing the property in a manner inconsistent with wetland preservation-and thereby achieve the goal of protecting the environmental status quo at a fraction of the cost.

The Fish and Wildlife Service acquired the Texas wetlands at issue in this case precisely in this manner. Little Sandy Hunting and Fishing Club donated a non-development easement on approximately 3800 acres of its land to the Fish and Wildlife Service so that the character of the wetlands would remain unchanged, undeveloped,

in perpetuity. These lands had been targeted by the Fish and Wildlife Service for several years because of its (*673) particula..y rich natural attributes. Some studies rated the vegetation on Little Sandy's land as "one of the most pristine bottomland areas i[n] the state [of Texas]." The lands consist of "old-growth timber," including willow, oak, hickory, gum, elm, ash, hackberry, palmetto, switchcane, and possum haw understory, and its bottomlands play host to such dwellers as mallards, gadwalls, ringnecks, and wood ducks.

The Sabine River Authority and the Texas Water Conservation Association, cognizant that the federal government's acquisition of this land foreclosed the State of Texas from taking the property by means of eminent domain, were less than pleased to learn of the donation. They had given serious consideration to using that land to

construct the Waters Bluff Reservoir, a $158 million, forty- five thousand acre project along the Sabine River in Smith, Upshur, and Wood Counties. Their plans for the construction of the reservoir, aimed at satisfying the anticipated need for additional water over the next forty years, were still in the preliminary stages: they had obtained none of the necessary federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the 300 thousand plus acre feet of water that the reservoir would generate each year. Nevertheless, they were dissatisfied with the turn of events and filed suit in the Eastern District of Texas alleging that the Fish and Wildlife Service had failed to comply with the procedural requirements of NEPA by not preparing an Environmental Impact Statement (an "EIS") in connection with its acquisition of the

Little Sandy non-development easement. They alleged that the easement was interfering with their long-term plan to take the property by eminent domain, construct the Waters Bluff Reservoir, and thus insure that the state's water supply would not be placed in jeopardy in the calendar year 2030. Invoking NEPA, they asserted that the Fish and Wildlife Service's acquisition of the easement constituted a "major federal action significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), thereby necessitating the preparation of an EIS.

In a comprehensive opinion, 745 F.Supp. 388 (E.D.Tex.1990), the district court dismissed their claims by way of summary judgment. The court reasoned that the Fish and Wildlife Service had prepared an adequate Environmental Assessment (the "EA") and had issued a "Finding of No Significant Impact"

("FONSI") as a precursor to acquiring the easement. Concluding that there was no corresponding change in the physical environment flowing from the acquisition of the non-development easement, the district court held that the Fish and Wildlife Service's decision to forego an EIS was not arbitrary and capricious. *Id.* at 392-97. It dismissed the lawsuit, and this appeal followed.

PHASE II

A preliminary issue in this case, indeed in every case, is whether the party bringing the lawsuit has standing. After rejecting on the merits plaintiffs' challenge to the Fish and Wildlife Service's decision to forego an EIS, the court below remarked that plaintiffs had no standing to bring this lawsuit in the first place. It reasoned that:

> The Court's finding that the plaintiffs' claims are not within NEPA's scope and that they are contrary to NEPA's purpose compels the conclusion that the plaintiffs lack standing to assert a claim under NEPA. The plaintiffs' interest in constructing a reservoir is unquestionably an interest that is *subject* to the provisions of NEPA, but it is not an interest that NEPA was designed to protect.

745 F.Supp. at 397. In essence, the district court concluded that because the Fish and Wildlife Service was not obligated under NEPA to prepare an EIS under the circumstances present in this case (a conclusion with which we agree), the injuries alleged by the plaintiffs as a consequence of the absence of an EIS were not within the zone of interests protected by NEPA. With that conclusion we disagree.

[1-3] The standing inquiry has constitutional, statutory, and judicially formulated (*674) components. *North Shore Gas v. EPA*, 930 F.2d 1239, 1242-43 (7th Cir.1991). It has as its origins the con-

stitutional requirement that federal courts only decide cases or controversies. Constitution, Article III, § 2. When we say that a particular plaintiff has no standing to bring the lawsuit in the constitutional sense, we mean that the plaintiff has not suffered an injury which is redressible by the court. *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). This inquiry places not too heavy a burden on a prospective plaintiff because even "a probabilistic benefit from winning a suit is enough 'injury in fact' to confer standing" under the Constitution. *North Shore Gas*, 930 F.2d at 1242.

[4] From an Article III perspective, the plaintiffs have standing. "Injury in fact is not confined to economic injury, but may include injuries to aesthetics and well-being." *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 640 (5th Cir.1983).

> The procedural injury implicit in agency failure to prepare an EIS-the creation of a risk that serious environmental impacts will be overlooked-is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project [such that they can] expect [ ] to suffer whatever environmental consequences the project may have.

City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir.1975); *accord Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 932, *modified*, 850 F.2d 599 (9th Cir.1988); *see also South East Lake View Neighbors v. Dept. of Housing and Urban Development*, 685 F.2d 1027, 1039 (7th Cir.1982) (construing *City of Davis* to hold that the "injury occurred with the creation of a risk that potential environmental damage would go undiscovered"); *cf. North Shore Gas*, 930 F.2d at 1242 ("a probabilistic benefit from winning a suit is enough 'injury in fact' to confer standing in the undemanding

Article III sense"); *but see Greenpeace USA v. Stone*, 748 F.Supp. 749, 755 (D.Hawaii 1990) (expressing concern over whether a plaintiff with a geographical nexus to project satisfies the injury in fact requirement by virtue of a procedural injury alone), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir.1991).

[5] The Sabine River Authority has been charged by the State of Texas with the weighty responsibility of managing, conserving, and monitoring the waters of the Sabine River in order to meet the "domestic uses of the people in the district, including all necessary water supplies for cities and towns." Water Aux. Laws art. 8280-133, § 14(d). It has alleged an economic injury (shortage of water supply) attendant to the Fish and Wildlife Service's acquisition of the Little Sandy Easement. The Texas Water Conservation Association is an organization

incorporated under the laws of the State of Texas which has as its stated mission the conservation of water resources of the state. Its membership includes "river authorities, individuals, firms, corporations, cities, water districts, public and private agencies and groups dedicated to the task of conserving, developing, protecting and utilizing the water resources of Texas for beneficial purposes." This organizational plaintiff has a "sufficient geographical nexus" to the Little Sandy property, and the interests at stake affect the members of the organization such that the organization has standing to bring the claims on their behalf. *See Save Our Wetland, Inc.*, 711 F.2d at 640 (organizational plaintiff had standing because member of organization who fished at site in question was "injured" by adverse aesthetic impact). The injuries that these

parties allege relate to the adverse environmental effects that they will experience as a result of the Fish and Wildlife Service's acquisition of the Little Sandy easement. As the district court observed:

> One effect of the [Fish and Wildlife Service]'s action is that as long as the easement remains in the National Wildlife Refuge System, [the Sabine River Authority] cannot build the Waters Bluff Reservoir. Although federal law provides certain procedures by which land may be released from the Refuge System, there is certainly a risk that [the Sabine River Authority] may not convince (*675) either the Congress or the Secretary of the Interior to relinquish the easement.

745 F.Supp. at 396 & n. 6. According to the plaintiffs, the Sabine River Authority's inability to condemn this property and build the Waters Bluff Reservoir on that site creates a substantial risk that the region will experience water shortages some forty years in the future. Although there is necessarily some speculation attendant to predictions of this sort,

the injuries alleged are not "too speculative to support their standing." *South East Lake View Neighbors*, 685 F.2d at 1035. While still in the early planning stages, plaintiffs were intent on going forward with the construction of the Waters Bluff Reservoir to pretermit any potential water shortage problems; the Little Sandy Easement has made that effort a virtual nullity. We therefore find "a fairly traceable causal connection between the defendant's allegedly illegal conduct and the plaintiff's purported injuries," *id.* at 1036, sufficient to confer standing in the constitutional sense.

[6] In the context of NEPA, however, the Supreme Court has recently explained that beyond the constitutional standing requirements, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls

within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Federation*, - U.S. -, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695 (1990) (emphasis in original); *see also Greenpeace USA*, 748 F.Supp. at 756 (*Lujan* "appears to heighten the requirements for establishing actual injury for purposes of standing under NEPA."). "[T]he only people who may sue to enforce a law are people who belong to the class that the law was designed to protect." *North Shore Gas*, 930 F.2d at 1243. In other words, "only intended beneficiaries of a statute can seek relief under it." *Id.* To illustrate, the Supreme Court posited that court reporters are plainly aggrieved when an agency fails to comply with a statutory provision that requires that all proceedings be transcribed; nevertheless, because

the parties to the proceedings, and not the court reporters, are the intended beneficiaries of the statutory provision, the parties and not the court reporters would have standing to challenge the agency's non-compliance with the statute. *Lujan*, 110 S.Ct. at 3186.

[7] We are persuaded that the injuries alleged by the plaintiffs in their complaints-harmful effects on the quality and quantity of East Texas' water supply-"are among the *sorts* of interests" that NEPA was specifically designed to protect. *Lujan*, 110 S.Ct. at 3187. These alleged injuries fall squarely within the class of injuries that NEPA safeguards: the circuit courts, to be sure, are flooded with cases which elucidate that water quality and water supply are prototypically matters of great environmental concern. *E.g., Olmsted Citizens for a Better Community*, 793 F.2d

201, 205 (8th Cir.1986) (a federal action which "poses a threat to the physical resources of the area because of anticipated . . . water supply problems" must be preceded by an EIS); *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 851-53 (9th Cir.1979) (holding that an EIS was required "to evaluate the environmental consequences of [the] decision [to divert water to industrial use]"); *City of Davis v. Coleman*, 521 F.2d 661, 671-72 (9th Cir.1975) (allegations in complaint "that the planned industrial development . . . may adversely affect the quality and quantity of the city water supply" established injury in fact within the zone of interests of NEPA). Indeed, NEPA itself articulates that the protection of the water quality and supply is an important concern of the statutory scheme. *See* 42 U.S.C. §§ 4321, 4331(c); *see also Metropolitan Edison Co.*

v. People Against Nuclear Energy, 460 U.S. 766, 103 S.Ct. 1556, 1560-61, 75 L.Ed.2d 534 (1983) (quoting from statements of two principal sponsors of NEPA which identify water supply and quality as a concern of NEPA). Moreover, these plaintiffs are the proper plaintiffs to raise these claims. Although "the intended beneficiaries of NEPA are individual citizens . . . the statute expressly contemplates that state and (*676) local governments are to play an important role in the effectuation of national environmental policy." *City of Davis*, 521 F.2d at 672 (citing 42 U.S.C. §§ 4331(a), 4332(2)(C), 4332(2)(F), 4341(4), 4345(1)).

This is not a case brought by a disappointed contractor who alleges that he has been injured because he would have been hired to build the Waters Bluff Reservoir had the Fish and Wildlife Service not ac-

cepted the negative easement. Like the court reporter example posited in *Lujan*, the contractor, though arguably aggrieved as a result of the Fish and Wildlife Service's acceptance of the negative easement, would not have standing under the "zone of interests" test because NEPA was not designed to protect contractors' rights: it was designed to protect the environment. Perhaps the best way to illustrate the point is to put the proverbial cart before the horse. If, contrary to our holding on the merits, NEPA *did* require the Fish and Wildlife Service to prepare an EIS in connection with the Little Sandy easement, we would still have to consider whether these plaintiffs have standing to challenge the Fish and Wildlife Service's non-compliance. We think it is quite plain that the Sabine River Authority and the Texas Water Conservation Association would

(and do) have standing to bring a lawsuit because the alleged harm flowing to these plaintiffs from the defendant's non-compliance with NEPA is of a kind with which NEPA is concerned.

PHASE III

[8] This case arises under the network of NEPA, a statute drafted to ensure that federal agencies "carefully consider detailed information concerning significant environmental impacts," and at the same time "guarantee[ ] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835, 1845, 104 L.Ed.2d 351 (1989); *accord North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1540 (11th Cir.1990). It is a procedural statute that

demands that the decision to go forward with a federal project which significantly affects the environment be an environmentally conscious one. The statute does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after taking a "hard look at environmental consequences." *Robertson*, 109 S.Ct. at 1846 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976)). Indeed, NEPA does not prohibit the undertaking of federal projects patently destructive of the environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences. "Other statutes may impose substantive environmental obligations on federal agencies, but

NEPA merely prohibits uninformed-rather than unwise-agency action." *Id.*

[9] How much information the agency must process is the subject of this litigation. NEPA instructs that federal agencies:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
>
> (i) the environmental impact of the proposed action, [and]
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented . . . .

42 U.S.C. § 4332(2)(C). Thus, NEPA directs federal agencies to prepare what is commonly known in the industry as an Environmental Impact Statement (an "EIS") when it engages in "major Federal action[ ] significantly affecting the environment."

> "An environmental impact statement is intended to detail the environmental and economic effects of any proposed federal action so that those not directly involved can understand and

> give meaningful consideration to and make appropriate comment on the factors involved. It also *677 ensures that the decisionmaker give serious weight to environmental factors in making discretionary choices."

State of Louisiana v. Lee, 758 F.2d 1081, 1084 (5th Cir.1985). An EIS is "not required for *non* major action or a major action which does not have *significant* impact on the environment." *Sierra Club v. Hassell*, 636 F.2d 1095, 1097 (5th Cir. Unit B 1981) (emphasis added).

[10] To assist federal agencies in resolving whether they must prepare an EIS, the federal Council on Environmental Quality ("CEQ") has issued regulations to which these agencies can turn for guidance. *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir.1985). These regulations are entitled to substantial deference, *Robertson*, 109 S.Ct. at 1848, and "are binding on federal agencies." *Fritiofson v. Alexander*, 772 F.2d 1225, 1236 (5th Cir.1985).

> The CEQ regulations permit federal agencies to make a preliminary "Environmental Assessment" ("EA") aimed at determining whether the environmental effects of a proposed action are "significant." 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, 1508.27 (1984). According to these regulations, the EA is a "concise" document that "briefly" discusses the relevant issues and either reaches a conclusion that preparation of an EIS is necessary or concludes with a "Finding of No Significant Impact" (called in environmental jargon, a "FONSI"). *Id.* §§ 1508.9, 1508.13.

Sierra Club v. Marsh, 769 F.2d at 870. Thus, "[t]he purpose of an EA is to 'provide sufficient evidence and analysis for determining whether to prepare an [EIS].' " *Fritiofson*, 772 F.2d at 1236 (quoting 40 C.F.R. § 1508.9(a)(1)). The EA is "a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement-which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project-is neces-

sary." *Cronin v. U.S. Dept. of Agriculture*, 919 F.2d 439, 443 (7th Cir.1990). The EA will come to one of two findings: either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant impact (a "FONSI") necessitating no further study of the environmental consequences which would ordinarily be explored through an EIS. *Fritiofson*, 772 F.2d at 1236; *Marsh*, 769 F.2d at 870.

[11] When, as in this case, the agency concludes that the preparation of an EIS is not required based on a FONSI, an aggrieved party may challenge the decision in federal court under the Administrative Procedures Act. 5 U.S.C. § 706(2)(A). Before today, our court instructed that a reviewing court should apply the moderately deferential "reasonableness" standard-rather than the highly deferential "arbitrary and capri-

cious" standard adopted by other circuits-in reviewing an agency's decision to forego an EIS. *See Fritiofson*, 772 F.2d at 1237. However, in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) ("*Oregon Natural*") the Supreme Court held that an agency's decision not to prepare a supplemental EIS is reviewable under the "arbitrary and capricious" standard. This intervening decision by the Supreme Court warrants the abandonment of the "reasonableness" standard.[1] Even though *Oregon Natural* involved an agency's decision not to prepare a *supplemental* EIS as opposed to an agency's decision not to prepare the *original* EIS, the "legal standard

---

[1]The *Fritiofson* panel rejected an invitation to abandon the reasonableness standard in favor of the "arbitrary and capricious" standard adopted by other circuits, recognizing that it could only do so if an intervening Supreme Court decision mandated as much.

for determining when a *supplemental* EIS is required is 'essentially the same as the standard for determining the need for an *original* EIS.' " Fritiofson, 772 F.2d at 1239 n. 8 (citation omitted). *Oregon Natural* has plainly emasculated our precedent applying the reasonableness standard with respect to the review of an agency's decision to forego a *supplemental* EIS. *See Oregon Natural*, 109 S.Ct. at 1861 n. 23 (citing with disapproval our decision in *Sierra Club v. Froelhlke*, 816 F.2d 205, 210 (5th Cir.1987)). We believe that it has similarly (*678) undercut our precedent applying the reasonableness standard with respect to an agency's decision to forego the *original* EIS. *See Lockhart v. Kenops*, 927 F.2d 1028, 1032 (8th Cir.) (holding that the intervening decision of *Oregon Natural* undercut Eight Circuit precedent applying the reasonableness standard with respect

review of an agency's decision to forego preparation of an original EIS), *cert. denied*, - U.S. -, 112 S.Ct. 186, 116 L.Ed.2d 148 (1991). The standard of review is limited, therefore, to the "arbitrary and capricious" standard. *Id.*; *see also North Buckhead Civic Ass'n*, 903 F.2d at 1538 (adopting "the arbitrary and capricious standard when reviewing agency action in NEPA cases").[2]

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[2]We recognize that the Eighth Circuit has held that *Oregon Natural* does not control the standard of review in a case where the issue involved is the threshold one of whether NEPA even applies at all. *Goos v. I.C.C.*, 911 F.2d 1283, 1292 (8th Cir.1990). If an agency determines that NEPA does not apply in the first instance, and the agency makes that determination without preparing an EA and without making a finding of no significant impact, the Eighth Circuit applies a reasonableness standard, not *Oregon Natural's* arbitrary and capricious standard. *Id.* We need not concern ourselves with these distinctions even though there is a substantial question presented in this case as to whether NEPA applies at all; the Fish and Wildlife Service decided to forego an EIS "after assuming the applicability of NEPA, after preparing an EA, and after determining that there was no significant [environmental] impact." *Goos*, 911 F.2d at 1292. Thus, the arbitrary and capricious standard of review applies. Although it is arguably a more lenient standard than the reasonableness test, *Fritiofson*, 772 F.2d at 1237-38, the differences

[12-14] Under this highly deferential standard of review, a reviewing court has the "least latitude in finding grounds for reversal." *North Buckhead Civic Ass'n*, 903 F.2d at 1538. It may not substitute its judgment for that of the agency, but must studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors. *Id.*; *Oregon Natural*, 109 S.Ct. at 1861. Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence. The agency may even rely on the opinions of its own experts, so long as the experts are quali-

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between the two standards is not "of great pragmatic consequence." *Oregon Natural*, 109 S.Ct. at 1861 n. 23 ("[O]ur decision today will not require a substantial reworking of NEPA."). And under either standard, we would affirm the judgment below.

fied and express a reasonable opinion. The reviewing court may be inclined to raise an eyebrow under such circumstances, but it must show the proper respect for an agency's reasoned conclusion even if the reviewing court finds the opinions of other experts equally or more persuasive. *Oregon Natural,* 109 S.Ct. at 1861.

> A reviewing court is to review the administrative records as well as other evidence to determine whether the agenc[y] adequately considered the values set forth in NEPA and the potential environmental effects of the project before reaching a decision on whether an environmental impact statement was necessary. If the agenc[y] engaged in this analysis and reasonably concluded on the basis of [its] findings that an impact statement was not required, [its] determination[ ] will be upheld.

Hassell, 636 F.2d at 1097-98. [3]

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[3] *Hassell* applied the "reasonableness" standard. Nevertheless, we believe that the inquiry under the "arbitrary and capricious standard" is clearly not more rigorous (though also only slightly more deferential) than that articulated in *Hassell*. *See Oregon Natural,* 109 S.Ct. at 1861 n. 23 ("[T]he difference between the 'arbitrary and capricious'

[15][16] When a court like ours is asked to review the decision of a district court which has sat as the reviewing court of first instance, the standard of review that we apply will vary depending on the course of proceedings below. If the district court has conducted an evidentiary hearing, and has drawn factual inferences and made credibility determinations, we must give great deference to the district court's conclusions.

> A court of appeals review of a district court review of an administrative agency's (*679) record is indeed an "awkward legal animal," but when the district court's judgment turns on factual matters, or upon the testimony of witnesses, or even upon lengthy evidentiary proceedings, the court of appeals should hesitate to reverse.

North Buckhead Civic Ass'n, 903 F.2d at 1539. Where, as here, the district court has resolved the case by way of summary

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and 'reasonableness' standards is not of great pragmatic consequence.").

judgment, our review of the district court's conclusions is plenary. We undertake the same task as the district court: we review the materials submitted to the district court (which will include the agency record) and determine whether the agency's conclusions were arbitrary and capricious. *Marsh*, 769 F.2d at 872 (1st Cir.1985). Because the district court's review pursuant to a summary judgment motion cannot turn on credibility determinations or conflicting factual inferences, *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264 (5th Cir.1991), we are in precisely the same position as the district court and can evaluate the record *de novo*.

PHASE IV

[17] The Fish and Wildlife Service concluded that by accepting the easement from Little Sandy, it did not undertake a major

federal action which significantly affected the environment. It prepared an EA which "adequately considered the environmental consequences of its actions." 745 F.Supp. at 402. The EA came to a finding of no significant impact (FONSI), and accordingly, the Fish and Wildlife Service did not find it necessary to prepare an EIS in connection with the acquisition of the easement. After a painstaking review of the agency record, the district court concluded that there was no clear error in the Fish and Wildlife Service's decision. We agree. As the district court observed:

> The [Fish and Wildlife Service]'s action in this case does not alter the environmental status quo; it does not cause any change in the physical environment. Indeed the purpose of the acquisition of the easement is to foreclose *any* change in the physical environment of a particular wetland site. As the Court observed in *National Association of Property Owners* [*v. United States*], NEPA does not require a federal agency to prepare an EIS in order "to leave nature

> alone." 499 F.Supp. [1223] at 1265 [D.C.Minn.1980)]. NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is not built.

745 F.Supp. at 394. The district court recognized that the acquisition of the easement by the Fish and Wildlife Service did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an EIS. "An "EIS is not required . . . when the proposed federal action will effect no change in the status quo." *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir.1980), *cert. denied*, 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981). Simply put, we hold that the acquisition of a negative easement which by its terms prohibits any change in the status quo does not amount to "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see*

Burbank Anti-Noise Group, 623 F.2d at 116-17 (no EIS required where FAA provided federal financial assistance in connection with the purchase of an airport); *Sierra Club v. Marsh*, 692 F.Supp. 1210, 1221 (S.D.Cal.1988) ("It would be inconsistent with NEPA's purpose to allow the city to use NEPA to obstruct the implementation of a settlement which will protect endangered species."). An EIS need not discuss the environmental effects of continuing to use land in the manner which it is presently being used. *Upper Snake River v. Hodel*, 921 F.2d 232, 235 (9th Cir.1980) (citing *Burbank Anti-Noise Group*, 623 F.2d at 116); *see, e.g., Hassell*, 636 F.2d at 1099 (rebuilding bridge destroyed in hurricane did not require preparation of EIS under regulations then in effect); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C.Cir.1979) (no EIS required

when government leased parking lot to new parking management because no change in the status quo), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980).

(*680) The Supreme Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy* makes clear that the inquiry in NEPA cases is whether the federal action at issue is "proximately related to a *change* in the physical environment." 103 S.Ct. at 1561 (emphasis added). The acquisition of a negative easement which prohibits development does not result in the requisite "change" to the physical environment. Of course, when the government *conveys* property to, or exchanges land with, a private party that plans to develop the land, an EIS is necessary because the conveyance of property is precipitating a change in the physical complexion of the land. *Lockhart v. Kenops*, 927 F.2d at 1033

(citing *National Forest Preservation Group v. Butz*, 485 F.2d 408, 411-12 (9th Cir.1973)); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1227 (9th Cir.1988), *cert. denied*, 489 U.S. 1066, 109 S.Ct. 1340, 103 L.Ed.2d 810 (1989); *Conservation Law Foundation of New England, Inc. v. General Services Administration*, 707 F.2d 626, 633 (1st Cir.1983). But by merely accepting title to the property-or, as in this case, accepting a negative easement which precludes any development of the land whatsoever-the government is not undertaking a project that changes the character or function of the land. *See Ono v. Harper*, 592 F.Supp. 698, 701 (D.Hawaii 1983) (no EIS required where proposed transfer of title would not cause any change in the physical environment). We view the Fish and Wildlife Service's "action" in accepting the negative easement as tantamount to

"inaction." *See Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243 (D.C.Cir.1980) (no EIS required when federal government decides not to exercise its authority to prevent the State of Alaska from killing wolves on federal land); *State of Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir.1979) (same); *cf. Bunch v. Hodel*, 793 F.2d 129, 135-36 (6th Cir.1986) (abdication of the Fish and Wildlife Service's obligations under the terms of a lease and the Migratory Bird Conservation Act could not be viewed as "inaction").

The agency came to a finding of no significant environmental impact, and we detect no error in that forecast.[4] "The court finds it unlikely that a no impact finding would be held unreasonable where

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[4]Ironically, neither does the defendant-intervenor Sierra Club, an environmental group which for the first time, apparently, has advocated *against* the need for an EIS.

the government seeks to acquire some additional parcels of land for environmental mitigation purposes." *Sierra Club v. Marsh*, 692 F.Supp. at 1221. The land is earmarked as a wildlife habitat and migratory bird refuge. We agree with the Fish and Wildlife Service and the district court that this intended "use" of the Little Sandy property has no significant environmental impact. On this point, we note that we are not altogether persuaded that the anticipated harm to the East Texas water supply can be precisely linked to the federal action at issue here. Although for purposes of standing we have held that the plaintiffs have established an injury in fact sufficient to bring these claims, an EIS is only necessary where there is "reasonably close causal relationship between a change in the physical environment and the effect at issue." *Metropolitan*

Edison, 103 S.Ct. at 1561. Aside from the absence of any "change" in the physical environment, we entertain serious doubts as to whether the adverse impact on water quality and supply expected in the year 2030 can be attributed to the Fish and Wildlife Service's acquisition of the Little Sandy easement. In our view, plaintiffs seek to stretch the parameters of predictability to their limits. They ask for environmental clairvoyance, though the agency personnel-and we judges-are but mere mortals.

We have given the record more than just a birds-eye view, and finding no reason to migrate from the district court's judgment, we take refuge in its nest.

AFFIRMED.

745 F.Supp. 388 (E.D.Tex. 1990)

SABINE RIVER AUTHORITY, Plaintiff,
Texas Water Conservation Association,
Plaintiff-Intervenor,
v.
UNITED STATES DEPARTMENT OF INTERIOR,
Donald Paul Hodel, in his official capacity as Secretary of Interior, United States Fish and Wildlife Service,
Frank H. Dunkel, in his official capacity as Regional Director of the Fish and Wildlife Service, and Little Sandy Hunting and Fishing Club, Defendants,
The Sierra Club and the National Audubon Society, Defendants-Intervenors.

No. TX-87-36-CA.
United States District Court,
E.D. Texas,
Texarkana Division.
Aug. 13, 1990.

Action was brought challenging the Fish and Wildlife Service's compliance with (*389) the National Environmental Policy Act in connection with the proposed acquisition of a conservation easement on wetlands habitat. On cross motions for summary judgment, the District Court, Paul N. Brown, J., held that: (1) the proposed acquisition did not change the status quo or have a detrimental impact on the environ-

ment and, thus, no environmental impact statement was necessary; (2) the environmental assessment prepared by the Fish and Wildlife Service gave adequate consideration to the need for action, to alternatives, and to comments received from other state and federal agencies; and (3) the general plan under which the Service would acquire easements to protect wetlands habitat was not a "proposal" for major federal action that would require an environmental impact statement.

Claims dismissed.

William H. Burchette, Christine Ryan, Jorden Schulte & Burchette, Washington, D.C., and Carl Roberts, Longview, Tex., Frank R. Booth, Booth & Newsome, Austin, Tex., for Sabine River Authority and Texas Water Conservation Ass'n, respectively.

Ruth Harris Yeager, First Asst. U.S. Atty., Tyler, Tex., Lisa Hemmer, U.S. Dept. of Justice, Washington, D.C., Joseph I. Worsham, Dallas, Tex., for Federal defendants and Little Sandy Club, respectively.

Wendy S. Dinner, Washington, D.C., for Sierra Club and National Audubon Society.

MEMORANDUM OPINION AND ORDER

PAUL N. BROWN, District Judge.

Pending before the Court are Motions for Summary Judgment filed by all parties. After carefully reviewing all of the motions and supporting briefs, the lengthy administrative record, and the applicable law, the Court finds that the motions of the defendants should be granted and those of the plaintiffs denied.

I. BACKGROUND

The dispute in this case concerns the decision of the Department of the Interior's Fish and Wildlife Service ("FWS") to accept

a conservation easement on 3800 acres of land owned by the Little Sandy Hunting and Fishing Club ("Club"). The FWS's acquisition of this easement conflicts with the plans of plaintiff Sabine River Authority ("SRA") to construct the Waters Bluff Reservoir. If constructed, the reservoir would inundate the lands encompassed by the easement.

Before acquiring the easement, the FWS prepared a draft environmental assessment ("EA") of the proposed acquisition pursuant to Department of Interior regulations implementing the review process mandated by the National Environmental Policy Act, 42 U.S.C. § 4332 ("NEPA"). (AR. P).[1] The FWS also conducted a public hearing on the proposed acquisition. (AR. I). Thereafter, the FWS issued a final EA recommending acquisition of the easement. (AR. D). The

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[1] "AR" refers to the Administrative Record.

FWS also issued a "Finding of No Significant Impact" ("FONSI") setting forth the FWS's conclusion that NEPA did not require the FWS to prepare an environmental impact statement ("EIS") concerning its acquisition of the easement. (AR. G-79). The FWS then accepted the easement.

Plaintiffs' Claims

SRA contends that the FWS's FONSI and decision not to prepare an EIS concerning its acquisition of the easement violated the provisions of NEPA. SRA claims that the FONSI is erroneous because acquisition of the easement is a "major Federal action [ ] significantly affecting the quality of the human environment" that requires the preparation of an EIS. SRA also claims that the FWS's EA is inadequate in several respects and that this matter should be remanded to the FWS for further consideration. Finally, SRA alleges that the acquisition

of the easement violated the Fish and Wildlife Act, 16 U.S.C. § 742a *et seq.* and the Refuge Recreation Act, 16 U.S.C. § 460k *et seq.*, because the terms of the easement do not provide for a right of access for the public.

Plaintiff-Intervenor Texas Water Conservation Association ("TWCA") also contends that the FWS should have prepared an EIS concerning its acquisition of the easement. In addition, TWCA asserts that the FWS's Texas Bottomlands Hardwood Preservation Program ("Preservation Program") is itself a "major Federal action [ ] significantly affecting the quality of the human environment" and that the FWS should have prepared an EIS concerning the Preservation Program.

The FWS and the Defendant-Intervenors Sierra Club and National Audubon Society (*392) contend that the FONSI is correct

since the easement preserves the "environmental status quo" by prohibiting development on the land encompassed by the easement. The FWS also contends that its EA was adequate and that it was not required to prepare an EIS concerning the Preservation Program. Finally, the FWS asserts that the terms of the easement do not violate the provisions of either the Fish and Wildlife Act or the Refuge Recreation Act.

II. STANDARD OF REVIEW

[1] The standard of review that this Court must apply to this case is set forth in *State of Louisiana v. Lee*, 758 F.2d 1081 (5th Cir.1985), *cert. den.*, 475 U.S. 1044, 106 S.Ct. 1259, 89 L.Ed.2d 570 (1986).

> NEPA requires the preparation of an [EIS] whenever a major federal action significantly affecting the quality of the human environment is proposed. . . . Judicial review of an agency's decision not to file an [EIS] is governed by the rule of reasonableness .

> . . whether the agency['s] decision not to develop an impact statement is reasonable and made objectively and made in good faith on a reviewable environmental record. . . . If the decision is reasonable, the determination must be upheld.

Id. at 1083.

The plaintiffs' burden in presenting a NEPA claim is also well-established.

> [T]he court must determine whether the plaintiff has alleged facts which, if true, show that the recommended project would materially degrade any aspect of environmental quality . . . If the court concludes that no environmental factor would be significantly degraded by the project, [the] determination not to file the [EIS] should be upheld. On the other hand, if the court finds that the project *may* cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement . . . .

Id. at 1084.

The plaintiff "must establish only that the [defendant] was unreasonable in concluding there was no reasonable possibility that the proposed action would signifi-

cantly degrade any environmental factor." *Id.* at 1085.

The Supreme Court has held that an agency's decision not to file an EIS should be reviewed under the "arbitrary and capricious" standard. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, -, 109 S.Ct. 1851, 1860, 104 L.Ed.2d 377 (1989). The Court suggested that there is little or no difference between this standard and the "reasonableness" standard that had been applied heretofore by courts in most of the circuits, including the Fifth Circuit. 490 U.S. at -, 109 S.Ct. at 1861 n. 23. In applying this standard of review, a court "must consider whether the decision [not to prepare an EIS] was based on a consideration of the relevant factors and whether there has been a clear error in judgment". 490 U.S. at -, 109 S.Ct. at 1861.

An agency's decision not to prepare an EIS may be erroneous for one of two different reasons. The evidence in the record may indicate that, "contrary to the FONSI, the agency's proposed action may have a significant impact on the human environment", or the record may show that the agency's NEPA review process was "flawed in such a manner that it cannot yet be said whether the [proposed action] may have a significant impact". *Fritiofson v. Alexander*, 772 F.2d 1225, 1238 (5th Cir.1985). If a court finds that the proposed action may have a significant impact, the court should order the agency to prepare an EIS. *Id.* On the other hand, should the court determine that the agency's review was inadequate, the court should remand the case to the agency for further proceedings to correct the inadequacies. *Id.*

III. REVIEW OF THE FONSI

[2] An agency need not prepare an EIS for actions that do not "significantly affect [ ] the quality of the human environment". *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d 423, 432 (5th Cir.1985). In determining whether (*393) particular agency actions "significantly affect [ ] the quality of the human environment", courts have analyzed an agency's action to determine whether those actions may alter the "environmental status quo" or cause a "significant degradation of some human environmental factor".

A federal agency proposing an action must prepare an environmental impact statement if that action may cause "a change in the [environmental] status quo." *Sierra Club v. Hassell*, 636 F.2d 1095, 1099 (5th

Cir.1981).[2] Any agency action that "may cause a significant degradation of some human environmental factor" also requires the preparation of an EIS. *State of Louisiana v. Lee*, 758 F.2d at 1086. *Lee* and *Hassell* do not set forth different tests, however, since any action that "may cause a significant degradation" of the environment certainly may cause "a change in the environmental status quo". Whether a federal agency's action "may cause a significant degradation of some human environmental factor" is analyzed in light of the "environmental status quo" existing at the time of the proposed action. *Id.*

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[2] *See also Sierra Club v. F.E.R.C.*, 754 F.2d 1506, 1510 (9th Cir.1985); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03 (D.C.Cir.1979), *cert. den.*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-17 (9th Cir.1980, *cert. den.*, 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981).

The principle underlying the determination of whether an agency's action may "significantly affect [ ] the quality of the human environment", by altering the "environmental status quo" or causing "a significant degradation of some human environmental factor" is that NEPA applies only to those federal actions whose effects may cause *changes in the physical environment*. NEPA's legislative history shows that Congress was only concerned with the effects of federal actions that may cause *changes* in the physical environment. "What is involved [in NEPA] is a congressional declaration that . . . . *we will not intentionally initiate actions which do irreparable damage to the air, land, and water . . . .*" *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73, 103 S.Ct. 1556, 1560, 75 L.Ed.2d 534 (1983), *citing*, 115 Cong.Rec.

40416 (1969) (Emphasis original). Indeed, a change in the physical environment is the *sine qua non* of any action that alters the "environmental status quo" or causes a "significant degradation of some human environmental factor".

Courts have recognized that federal actions that do not change the status quo of the physical environment do not require the preparation of an EIS under NEPA.[3] For example, in *Ono v. Harper*, 592 F.Supp. 698, 701 (D. Hawaii 1983), local governmental authorities sued to block the transfer of federally owned land to private individuals. The Court stated that "the focus of an [EIS] is the change in the physical environment caused by the federal action at issue" and dismissed the local authorities' NEPA claim because the authorities had not alleged that the transfer of title to the

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[3] *See* Cases cited at note 2.

land would cause any change in the physical environment. *Id.* at 701. In *National Association of Property Owners v. United States*, 499 F.Supp. 1223 (D.Minn.1980), *aff'd*, 660 F.2d 1240 (8th Cir.1981), *cert. den.*, 455 U.S. 1007, 102 S.Ct. 1645, 71 L.Ed.2d 876 (1982), the district court rejected a challenge to the implementation of restrictions on recreational activities in a federally-designated wilderness area under the Boundary Waters Canoe Area Wilderness Act, based upon the claim that an EIS was required before the restrictions could be implemented. 499 F.Supp. at 1264-66. The Court held that implementation of the restrictions on activities in the wilderness area did not "significantly affect [ ] the quality of the human environment". *Id.* at 1265.

> [T]he Secretary's implementation of the Act enables no person to significantly affect the Wilderness. In

> fact, plaintiffs' major complaint is simply that Congress' mandate to the Secretary will effectively close portions of the Wilderness. . . . In essence, plaintiffs' claim is that the Department of Agriculture must prepare an (*394) EIS in order to leave nature alone. The Court is not moved by this argument.

Id.

Finally, the principle that NEPA applies only to those federal actions that may cause changes in the physical environment is supported by the corollary principle that NEPA does not require an agency to consider those potential effects of a proposed action that do not have a "reasonably close causal relationship [to] a change in the physical environment caused by the major federal action at issue". *Metropolitan Edison*, 460 U.S. at 774, 103 S.Ct. at 1561. "[T]he congressional concerns that led to the enactment of NEPA suggest [ ] that the terms 'environmental effect' and 'environmental impact' in [NEPA] be read to

include a requirement of a reasonably close causal relationship between a *change* in the *physical* environment and the effect at issue." *Id.* at 774, 103 S.Ct. at 1561. Accordingly, any alleged effects of an agency's action that do not have a reasonably close causal relationship to a change in the physical environment caused by the agency's action are not within the scope of NEPA and can not form the basis of a NEPA claim.

In summary, whether the FWS should have prepared an EIS concerning its acquisition of the conservation easement depends upon whether the FWS's action is one that may "significantly affect [ ] the quality of the human environment", which, in turn, depends upon (1) whether the FWS's action may cause "a significant degradation of some human environmental factor" through a change in the physical environment, and (2)

whether the allegedly significant effects of the FWS's action have a reasonably close causal relationship to any change in the physical environment caused by the FWS's action.

No Change in the Status Quo

[3] The FWS's action in this case does not alter the environmental status quo; it does not cause any change in the physical environment.[4] Indeed the purpose of the acquisition of the easement is to foreclose *any* change in the physical environment of a particular wetland site. As the Court observed in *National Association of Property Owners*, NEPA does not require a federal

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[4] The FONSI issued by the FWS is also consistent with FWS regulations that categorically exclude from the NEPA review process

> [t]he acquisition of land in accordance with the Service's procedures, when the acquisition is from a willing seller, the acquisition planning process has been performed in coordination with the affected public and continuance of essentially the existing use is planned.

Department of the Interior Department Manual, 30 AM 2, Ex. 4, 516 DM 6 App. 1, 1.4A(4) (4/30/84).

agency to prepare an EIS in order "to leave nature alone". 499 F.Supp. at 1265. NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is *not* built.

Under *State of Louisiana v. Lee*, the plaintiffs' burden in this case is to allege facts which, if true, would show that the FWS's action may cause "a significant degradation of some human environmental factor" through a change in the physical environment. The plaintiffs have failed to sustain this burden. The Court finds that when the FWS acquires an interest in land, such as a conservation easement, for the express purpose of preserving the land in its then-existing natural state, there is no reasonable possibility that such action may cause "a significant degradation of

some human environmental factor" through a change in the physical environment.

Absence of a Causal Connection

[4] As indicated by the Court in *Metropolitan Edison*, NEPA requires that federal agencies consider only the effects of actions that have a reasonably close causal relationship to changes in the physical environment caused by those actions. The alleged "effects" of the FWS's action in this case are the "elimination" of a potential water supply--the Waters Bluff Reservoir--and the risk that the area served by the SRA will suffer water shortages in the future if the reservoir is not built. The plaintiffs allege that

> [a]cquisition of the Club easement and placement of that easement in the refuge system immediately injured the interests (*395) of the SRA and others of TWCA's members by eliminating the Waters Bluff Reservoir and setting in motion the effects that followed the elimination of that water supply.

The harmful effect that the plaintiffs claim the FWS's action will have on the environment is the result of what the FWS's action *prevents* SRA and others from doing. Thus, the plaintiffs' claim presents the converse of the typical NEPA claim, which usually involves federal actions that initiate or permit development of natural resources. This case poses the novel question of whether NEPA requires consideration of the effects of federal actions when the effects of those actions are to *foreclose* development or use of some natural resource. The answer to this question is that NEPA does not require a federal agency to consider such effects since those effects result from what the federal action prohibits third parties from doing, and not from any "changes in the physical environment caused by the federal action" itself.

The cases cited by SRA and TWCA to support their position are inapposite.

TWCA cites the case of *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir.1979) for the proposition that a change in the use of water resources caused by federal action requires the preparation of an EIS. In *Andrus*, the Department of the Interior decided to implement a program of marketing substantial amounts of water for industrial uses from two *existing* reservoirs. The diversion of water resources affected both the prospects of future industrial development and the amount of water available for irrigation downstream from the reservoir. The Court of Appeals held that the program was a "major federal action" under NEPA that required the preparation of an EIS. *Id.* at 851-52. *Andrus* can be readily distinguished from this case on the following basis.

In *Andrus*, the diversion of existing water supplies from two existing reservoirs had the effect of altering the amount of water available to agricultural users in order to allocate additional water resources for industrial users. The federal action in *Andrus* clearly had an effect that *changed the physical environment*. In this case, there is no *existing* reservoir, there is no diversion of any existing water resources, and there is no *change in the physical environment* as a result of the acquisition of the easement by the FWS.

The other cases cited by the plaintiffs for the proposition that federal actions that may create "water-supply problems" always require the preparation of an EIS all concern the potential effects that *commercial or industrial development* may have upon water supplies. *See e.g. City of Davis v. Coleman*, 521 F.2d 661 (9th

Cir.1975). Yet commercial or industrial development can not take place absent some *change in the physical environment*. In *Coleman*, the federal action at issue was the proposed construction of a freeway interchange. The Court held in that case that the City of Davis had standing to prosecute a claim under NEPA since the city alleged that "the planned industrial development which the interchange will make possible may adversely affect the quality and quantity of the city water supply because of increased use and the danger of contamination by industrial wastes". *Id.* at 671. Commercial or industrial development and preservation are not synonymous under NEPA, and the FWS's acquisition of a conservation easement does not pose a "water-supply problem" that requires the preparation of an EIS.[5]

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[5] Another case cited by the plaintiffs, *Goodman*

The alleged effects of the FWS's action in this case are analogous to the effects analyzed in *Metropolitan Edison* and are likewise beyond the scope of NEPA. In *Metropolitan Edison*, the Nuclear Regulatory Commission prepared an EIS concerning the relicensing of a nuclear-powered electrical generating station. Although the Commission considered the risk of a nuclear accident in its EIS, it decided not to (*396) consider the effect of this risk upon the psychological health of those who lived near the power plant. The Supreme Court observed that

> a *risk* of an accident is not an effect on the physical environment [and] is, by definition, unrealized in the physical world. . . . We believe that the element of risk lengthens the causal chain beyond the reach of NEPA.

Group, Inc. v. Dishroom, 679 F.2d 182 (9th Cir.1982) does not address "watersupply problems", but instead holds that socioeconomic impacts of a federal action do not trigger NEPA's requirement of an EIS. *Id.* at 185-86.

Metropolitan Edison, 460 U.S. at 775, 103 S.Ct. at 1562. The same element of risk is present in the alleged effects of the FWS's action in this case.

One effect of the FWS's action is that as long as the easement remains in the National Wildlife Refuge System, SRA can not build the Waters Bluff reservoir. Although federal law provides certain procedures by which land may be released from the Refuge System, there is certainly a risk that SRA may not convince either the Congress or the Secretary of the Interior to relinquish the easement.[6] According to SRA, failing to build the Waters Bluff

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[6] No land that is a part of the Refuge System may be disposed of except by Act of Congress unless (1) the Department of the Interior and the Migratory Bird Conservation Commission determine that such lands are no longer needed for wildlife refuge purposes and the Department is paid the fair market value of the land, (2) the Department acquires other lands by exchange, or (3) such land is transferred pursuant to the terms of a cooperative agreement with a state or local government, by which agreement the land originally became part of the refuge system. 16 U.S.C. s 668dd(a)(3).

reservoir also creates a risk that SRA will face water shortages *in the future* that will adversely affect the economic welfare of the region that SRA serves. Yet a risk that the reservoir will never be built and that water shortages may occur in the future as a result is not an effect on the "physical environment". *Metropolitan Edison*, 460 U.S. at 775, 103 S.Ct. at 1562. There is no causal relationship between such speculative effects and any change in the physical environment caused by the acquisition of the easement. The element of risk inherent in the alleged effects of the FWS's action in this case "lengthens the causal chain beyond the reach of NEPA". *Id.* The Court finds that the effects of the FWS's action upon the plaintiffs are not within the scope of NEPA and can not form the basis of a NEPA claim.

Plaintiffs' Claims are Contrary to NEPA's Purpose

[5] The FWS's EA reveals that the FWS adequately considered the fact that SRA wanted to acquire the Club's land for an alternative use, but the FWS nevertheless chose to acquire the easement. (AR. D p. 20-21). A careful analysis of the plaintiffs' claims makes it abundantly clear that the plaintiffs simply object to the FWS's policy of acquiring conservation easements on wetland habitat where doing so poses a hindrance to the construction of reservoir projects. The plaintiffs' disagreement with the FWS is more akin to a political dispute over policy choices than a legal dispute over compliance with the procedural requirements of NEPA. *Cf. Foundation on Economic Trends v. Lyng*, 817 F.2d 882, 886 (D.C.Cir.1987). "Neither the language nor the history of NEPA suggests

that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions . . . [t]he political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." *Metropolitan Edison*, 460 U.S. at 777, 103 S.Ct. at 1563.[7] To permit the plaintiffs to use the provisions of NEPA to voice their policy objections to the FWS's actions and to hinder the FWS's attempts to fulfill its mandate from Congress would be contrary to the purposes of NEPA.

An analogous situation was presented in the case of *Sierra Club v. Marsh*, 692 F.Supp. 1210 (S.D.Cal.1988). In that case, a city applied for an injunction to prohibit the transfer of certain property from

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[7] Legislation that would withdraw the Club Easement from the Refuge System is now pending before the Marine and Fisheries Committee in the House of Representatives.

a private party to the United States pursuant to an agreement to settle a lawsuit. The city desired to develop the property in accordance with a local development plan. If (*397) transferred, the land would be used as a wildlife refuge, in mitigation for other land involved in the construction of a local highway/flood control project. The city passed an ordinance that imposed certain conditions upon the transfer which would have rendered the land useless as a wildlife refuge. *Id.* at 1215. The Court's discussion of the city's claim has particular relevance to this case.

> The federal government is trying to discharge its obligations under a high priority federal program to protect endangered species. A private landowner wants to donate the land to the government to effectuate these purposes. The City of Chula Vista has passed a local resolution in an attempt to stymie any transfer of the property which it believes does not serve the City's interests, which it has defined as development in strict accordance with its [local development plan].

Id. at 1215.

The Court found that the City's NEPA claim presented "the anomalous situation in which a municipality is trying to use federal environmental laws as a means of protecting a plan for desired local commercial and residential development". *Id.* at 1221. The Court rejected the city's NEPA claim on the grounds that "[i]t would be inconsistent with NEPA's purposes to allow the city to use NEPA to obstruct [the land transfer] which will protect endangered species." *Id.*

In this case, the FWS is attempting to carry out an express mandate from Congress to acquire and protect wetland habitat.

> It is the purpose of this Act to promote, in concert with other Federal and State statutes and programs, the conservation of the wetlands of the Nation ... by (2) intensifying efforts to protect the wetlands of the Nation through acquisition [of wetlands] in fee, easements or other interests . . .

Emergency Wetlands Resources Act of 1986, 16 U.S.C. § 3901(b)(2).

This case also presents the anomalous circumstance of a governmental entity attempting to use the provisions of NEPA to protect its plan to *develop* natural resources in a manner that will unquestionably result in substantial changes in the physical environment. To permit the plaintiffs to use the federal environmental laws to this end and to hinder the FWS's efforts to carry out its directive from Congress would be contrary to the purposes of NEPA and contrary to the FWS's mandate under § 2(b)(2) of the Emergency Wetlands Resources Act.

Plaintiffs lack Standing under NEPA

[6] To have standing to challenge the FWS's action under NEPA, the plaintiffs must show that they have been adversely affected by the FWS's action within the mean-

ing of NEPA. See *Lujan v. National Wildlife Federation*, --- U.S. ----, 110 S.Ct. 3177, 3185-86, 111 L.Ed.2d 695 (1990). In other words, the plaintiffs must establish that the injury of which they complain "falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis of [the] complaint". *Id.* 110 S.Ct. at 3186. The Court's finding that the plaintiffs' claims are not within NEPA's scope and that they are contrary to NEPA's purpose compels the conclusion that the plaintiffs lack standing to assert a claim under NEPA. The plaintiffs' interest in constructing a reservoir is unquestionably an interest that is *subject* to the provisions of NEPA, but it is not an interest that NEPA was designed to protect.

Summary

The Court finds that the FWS's decision not to prepare an EIS concerning the easement acquisition was not arbitrary and capricious; the FWS adequately considered all relevant factors, and there is no clear error in its judgment. *Marsh v. Oregon Natural Resources Council*, 490 U.S. at ---- , 109 S.Ct. at 1861. The FONSI issued by the FWS is correct since there is "no reasonable possibility" that the FWS's action will cause "a significant degradation of some human environmental factor" through a change in the physical environment. *State of Louisiana v. Lee*, 758 F.2d (*398) at 1085. Furthermore, the plaintiffs' claims are not within the scope of NEPA because (1) the alleged effects of the FWS's action lack the requisite causal relationship to any change in the physical environment caused by the acquisition of the easement,

Metropolitan Edison, 460 U.S. at 773, 103 S.Ct. at 1561; and (2) the plaintiffs' claims are an improper attempt to use the provisions of NEPA to hinder the FWS in carrying out its mandate from Congress to acquire and preserve wetland habitat. For these same reasons, the plaintiffs also lack standing to assert a claim under NEPA, since the plaintiffs' alleged injury is not within the "zone of interests" that NEPA was designed to protect.

IV. ADEQUACY OF THE EA

[7] As an alternative to their contention that the FONSI is incorrect, the plaintiffs contend that the EA prepared by the FWS is inadequate in several respects and that the case should be remanded to the FWS for further consideration. The Court has carefully reviewed the EA in light of the administrative record and the applicable law and finds that the EA is adequate.

Preparation of an EA is the proper procedure for an agency to utilize in determining whether to prepare an EIS concerning a proposed action. *Vieux Carre Property Owners, Residents and Associates, Inc. v. Pierce*, 719 F.2d 1272, 1281 (5th Cir.1983); 40 C.F.R. § 1508.9(a)(1). Federal agencies have a duty to prepare a reviewable administrative record, and a court must review the reasonableness of the agency's determination on the basis of the information available to the agency at the time the EA was prepared. *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d at 433. NEPA does not mandate any particular result of the review process but only requires that federal agencies take a "hard look" at the environmental consequences of a proposed action before such action is undertaken. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, ----

, 109 S.Ct. 1835, 1846, 104 L.Ed.2d 351 (1989). As long as an agency adequately considers the consequences of its proposed action, NEPA does not prohibit the agency from concluding that the benefits of its action outweigh its costs. *Id.* "NEPA merely prohibits uninformed--rather than unwise--agency action." *Id.*

Consideration of the Need for Action

[8] In this case, the FWS selected the land owned by the Club for possible acquisition on the basis of the findings of a biological survey conducted at the FWS's request. (AR. A). The survey identified the Club's land as a particularly valuable site of wetlands habitat, habitat that numerous studies had indicated was rapidly diminishing. (AR. A-IV). The FWS used the findings of the biological survey in compiling the Concept Plan and Land Protection Plan. (AR. C, p. 3). The FWS's reliance

on the survey data to evaluate the importance of acquiring the conservation easement on the Club land was clearly reasonable.

Consideration of Water-Supply Issues

[9] Both the survey and the Concept Plan identified planned reservoir projects as a principal source of conflict with preservation of wetland sites in eastern Texas. (AR. B, p. 133). The survey specifically excluded wetlands sites that might conflict with planned reservoir projects. (AR. A-II). In evaluating the extent of the conflict between wetlands sites and planned reservoir projects, the FWS relied upon the 1984 Texas Water Plan developed by the Texas Department of Water Resources. (AR. H). The FWS's reliance on the Water Plan's data and projections concerning future reservoir projects and water supplies was reasonable in light of the fact that the

Water Plan is "designed to be a state- wide comprehensive estimation of the future water demands and supplies for all of Texas over a 50-year planning period". (Amicus Brief of the State of Texas at p. 8).

Although Waters Bluff was not listed as a planned reservoir in the Water Plan, the FWS nevertheless reviewed the SRA's Master Plan Update which contained SRA's own water supply projections to support its conclusion that Waters Bluff is a feasible and necessary reservoir project. (AR. D, p. (*399) 13, 50; AR. L--N). SRA's Master Plan Update relied on the Water Plan to provide "some of the basic data sources utilized in the projections of future basin water requirements". (AR. M, p. 1-6). The record indicates that the FWS fully considered the available data on future water supply needs of the Sabine River Basin contained in both the Water Plan and SRA's

Master Plan Update. The final EA issued by the FWS contains an adequate discussion of the water-supply issues raised by SRA in its opposition to the proposed easement. (AR. D, p. 12-16).

There is no indication that the FWS failed to consider pertinent data in reaching its conclusion. The plaintiffs merely disagree with the FWS's interpretation of the available data and the conclusion that the FWS reached. Yet "the mere existence of differing opinions does not make [the agency's] decision erroneous." *State of Louisiana v. Lee*, 758 F.2d at 1085. This Court can not conclude that the FWS's review of the water-supply issues raised by SRA was inadequate or that the FWS's conclusion was unreasonable, arbitrary or capricious.

Consideration of Alternatives

[10] The plaintiffs contend that the FWS failed to adequately consider alternatives to acquisition of the easement. The FWS considered four alternatives: (1) taking no action to preserve the Club's land, (2) establishing a refuge in conjunction with the Waters Bluff project, (3) acquiring the Club's land in fee simple, and (4) acquiring a less-than-fee-simple interest in the Club's land. (AR. D, p. 20-25). SRA faults the FWS for not considering the acquisition of high priority wetland habitat outside the area of SRA's Waters Bluff project and for failing to adequately consider establishing a refuge in conjunction with the Waters Bluff project.

Once an agency adequately addresses alternatives to its proposed action, "the decision of which alternative to follow is within the agency's discretion". *South*

Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005, 1017 (5th Cir.1980). "[T]he range of alternatives that reasonably must be considered decreases as the environmental impact of the proposed action becomes less and less substantial". *Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 208 (8th Cir.1986). Although consideration of some range of alternatives is essential to any environmental assessment, it makes little sense to fault an agency for failing to consider "more environmentally sound alternatives to a project which it has *[properly]* determined, through its decision not to file an impact statement, will have no significant environmental effects anyway". *Id.; see also City of New York v. United States Dept. of Transportation*, 715 F.2d 732, 744 (2nd Cir.1983), *cert. den.*, 465 U.S. 1055, 104 S.Ct. 1403, 79 L.Ed.2d

730 (1984). Since the FONSI concerning acquisition of the easement is correct, the range of alternatives considered by the FWS was adequate.

The FWS considered and rejected the no-action alternative for the simple reason that doing nothing to preserve the highest priority site of wetland habitat would not be consistent with the FWS's preservation efforts and would likely permit the irretrievable loss of the habitat. (AR. D, p. 21). Similarly, establishing a refuge in conjunction with the Waters Bluff project was rejected because that alternative would not prevent destruction of the wetland habitat. (AR. D, p. 20-21). The FWS also concluded that any area set aside for refuge purposes would be of inferior quality. (AR. D, p. 20-21). This conclusion is supported by the report issued by the Texas Parks and Wildlife Department which sug-

gested that wetland sites established in conjunction with reservoir projects are of only "marginal" value to waterfowl populations. (AR. K-I-7, p. 18-19). Acquisition of the Club's land in fee- simple was not an available alternative because the Club was not willing to sell, and the FWS was operating under budgetary constraints that made no-cost acquisitions especially attractive. (AR. D, p. 23-24). The Court finds that the FWS's consideration of these alternative courses of action was adequate and reasonable.

(*400)

Consultation with Other Agencies

[11] The plaintiffs contend that the FWS failed to properly consult with other federal and state agencies during the NEPA review process. This claim is not supported by the evidence in the record, and it is based on the erroneous assumption that NEPA

mandates inter-agency consultation *before* a draft EA is prepared.

Although the applicable regulations do not address the timing of inter-agency consultation in the preparation of an EA, the regulations do provide that after preparing a draft EIS and before preparing a final EIS the agency shall obtain the comments of other Federal agencies and request the comments of appropriate State and local agencies. 40 C.F.R. § 1503.1(a)(1, 2). The regulations further provide that an agency shall respond to such comments. *Id.* at § 1503.4(a). There is nothing in NEPA or the applicable regulations to suggest that the timing of consultations should be any different when an agency prepares a draft EA as opposed to a draft EIS.

The record indicates that the FWS circulated its draft EA to all appropriate federal and state agencies. (AR. D, p. 49-50;

AR. G-84). The FWS then received a number of written comments both critical and supportive of its proposed action. (AR. K). The FWS also received oral and written comments during the public meeting concerning the easement. (AR. I). In response to these comments, the FWS revised its draft EA to include a discussion of the alleged controversial aspects of its acquisition of the easement. (AR. P, p. iii; AR. D, p. iii). While the draft EA contained only a brief reference to SRA's Waters Bluff project, the final EA contains a responsive discussion of the water-supply issues raised by SRA. (AR. P, p. 9; AR. D, p. 12-16). The FWS also revised the EA to address the alternative of establishing a refuge in conjunction with the Waters Bluff project. (AR. P, p. 11-12; AR. D, p. 20). Thus, the record demonstrates that the FWS considered and responded to the comments

raised in opposition to the easement.[8] The FWS's action was consistent with the requirement that an agency involve the public as well as other government agencies in preparing an EA. See 40 C.F.R. § 1501.4(b). That the FWS chose not to agree with the objections raised by SRA and others does not undermine the adequacy of the FWS's NEPA review.

30-Day Comment Period

[12] A related issue raised by the plaintiffs is the FWS's alleged failure to provide a 30-day comment period after the FONSI was issued. *See* 40 C.F.R. § 1501.4(e)(2). This regulation mandates

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[8] The case cited by the plaintiffs in support of their contention is readily distinguishable. In *Simmans v. Grant*, 370 F.Supp. 5, 18-19 (S.D.Tex.1974), the Court found that the federal agency had failed to contact, or to consider the views of, several other agencies in preparing an EA and a FONSI and that there had been little or no opportunity provided for the public to express its views on the agency's proposed action. The record in this case reveals no similar deficiency in the FWS's NEPA review process.

such an additional comment period if the agency's proposed action (1) is, or is closely similar to, action that "normally requires" the preparation of an EIS under regulations adopted by the agency, or (2) "the nature of the action is one without precedent". § 1501.4(e)(2)(i-ii).

Whether the acquisition of the conservation easement is or is similar to an action that "normally requires" the preparation of an EIS under Department of Interior regulations is the subject of somewhat conflicting provisions in those regulations. On the one hand, the regulations provide that an FWS proposal to establish "new refuges, fish hatcheries, or research stations and major additions to existing installations" will "normally require the preparation of an EIS". Department of the Interior Department Manual, 516 DM 6, App. 1, 1.3A(1). The regulations further provide

that if an EIS is not prepared for such proposals, "an EA will be prepared and handled in accordance with § 1501.4(e)(2)". *Id.* at 1.3B. On the other hand, the regulations categorically exclude from the NEPA process "acquisition of land in accordance with the Service's procedures, when acquisition is from a willing seller, the acquisition planning process has been performed (*401) in coordination with the affected public and continuance of essentially the existing use is planned". *Id.* at 516 DM 6, App. 1, 1.4A(4). The resolution of this apparent conflict lies in a common-sense interpretation of these provisions.

Although the effect of the FWS's actions in this case was to create a "new refuge", the other types of actions described in section 1.3A(1) are sufficiently dissimilar to the FWS's action in this case to support the conclusion that the acquisition of a

conservation easement by the FWS is not the "establishment of [a] new refuge [ ]" for purposes of section 1.3A(1). "Establishment of new ... fish hatcheries, research stations and major additions to existing installations" involves more than the mere acquisition of a property interest such as a conservation easement. This interpretation of section 1.3A(1) is thus fully consistent with section 1.4A(4)'s categorical exclusion of land acquisitions by the FWS from a willing seller where a continuation of the existing use of the land is planned--an apt description of the FWS's action in this case. That the FWS prepared an EA concerning the easement acquisition does not undermine this conclusion because the regulations provide that an EA "may be prepared on any action [even those covered by a categorical exclusion] at any time in order to assist planning and decision- mak-

ing". *Id.* at 516 DM 3.2; *see also* 40 C.F.R. § 1508.4. Accordingly, the FWS's action in this case was not one that would normally require the preparation of an EIS under regulations adopted by the FWS, nor was it similar to such an action.

The 30-day comment period must also be provided if "the nature of the proposed action is one without precedent". 40 C.F.R. 1501.4(e)(2)(ii). Whether the "nature" of the FWS's action is "without precedent" is largely a function of the definition one assigns to the term "nature". If, as the plaintiffs argue, the "nature" of the FWS's action is the acquisition of a conservation easement in an area where construction of a reservoir is planned, then the action is "without precedent" since the FWS admits that no other conservation easements have been acquired in an area where a reservoir project is planned. Yet the common under-

standing of the term "nature"--the essential character of something--illustrates that the FWS's action was not "without precedent". The essential character of the FWS's action is the acquisition of a conservation easement under circumstances that pose a conflict with another party's desired uses of the same land. The "nature" of the FWS's action is not "without precedent" since the FWS has heretofore acquired similar easements under circumstances that also posed a conflict with other potential uses of the same land. (AR. D, p. iii). Because the FWS's action was not without precedent, no additional comment period under 40 C.F.R. § 1501.4(e)(2) was required.

Finally, even if the Court were to find that the 30-day comment period applied to the FONSI in this case, the plaintiffs have failed to identify any *additional* relevant information that they or any other party

would have provided the FWS. Accordingly, there is nothing to suggest that the absence of the additional comment period deprived the FWS of relevant information such as would undermine the reasonableness or adequacy of the FWS's NEPA review process.

Consideration of Controversy, Precedent and Cumulative Effects

[13] The plaintiffs also contend that the FWS failed to consider the extent of the controversy surrounding its action, the precedential nature of the action, and the cumulative effects of acquiring additional conservation easements. This claim is based on regulations that provide that in determining whether a proposed action is "significant" under NEPA, the "intensity" or severity of the environmental "impact" of the proposed action must be considered. 40 C.F.R. § 1508.27(b). Among the several factors listed for consideration in deter-

mining "intensity" are the "degree to which the effects on the quality of the human environment are likely to be highly controversial", "the degree to which the action may establish a precedent for future actions with significant effects", and whether the action is related to other actions with (*402) individually insignificant but cumulatively significant impacts". *Id.* at § 1508.27(b)(4, 6, 7).

The only "effects" or "impacts" that must be considered under NEPA, however, are those that have a reasonably close causal relationship to a *change* in the *physical* environment caused by the federal action at issue. *Metropolitan Edison*, 460 U.S. at 773, 103 S.Ct. at 1561. The Court has already found that the alleged effects of the FWS's action in this case--interference with SRA's plans to build Waters Bluff and a risk of future water shortages--lack the

requisite causal relationship because acquisition of the easement *will not* cause any change in the physical environment. Since the alleged effects of the FWS's acquisition of the easement are beyond the scope of NEPA, the factors listed in § 1508.27(b) are of no legal significance to this case, because such factors are only relevant to an evaluation of whether the "effects" of a proposed action are "significant" under NEPA.

The case cited by the plaintiffs, *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir.1985) does not compel a contrary finding. That case discussed "precedent for future actions with significant effects" in the context of actions taken by an agency that would *encourage* further commercial or industrial development. See *Id.* at 879. Such is not the case here. To the extent that the acquisition of this easement sets

a precedent for acquisitions of additional conservation easements by the FWS, such future actions would not have "significant effects" under NEPA because the acquisition of such easements does not cause any "change in the physical environment".

Summary

Although the plaintiffs disagree with the FWS's evaluation of the data compiled in the NEPA review process as well as the conclusions reached by the FWS, such disagreement is not sufficient to raise a NEPA claim. The purpose of NEPA is to ensure that federal agencies do not make uninformed, as opposed to "unwise", decisions that affect the environment, and so long as an agency adequately considers the consequences of its proposed action, NEPA does not prohibit the agency from concluding that the benefits of its action outweigh its costs. *Robertson v. Methow Valley*

Citizens Council, 490 U.S. at ----, 109 S.Ct. at 1846. The record shows that in this case, the FWS adequately considered the environmental consequences of its action and that is all that NEPA requires.

V. CONCEPT PLAN NOT SUBJECT TO NEPA

[14] The plaintiffs also contend that the FWS should have prepared an EIS concerning the Preservation Program. Unless the Preservation Program is a "proposal" for a major federal action, NEPA does not require the preparation of an EIS. *See Kleppe v. Sierra Club*, 427 U.S. 390, 399, 96 S.Ct. 2718, 2725 (1976); Foundation On Economic Trends v. Lyng, 817 F.2d 882, 885-86 (D.C.Cir.1987). "The mere contemplation of certain action is not sufficient to require an impact statement." *Fritiofson v. Alexander*, 772 F.2d at 1240. Under 40 C.F.R. § 1508.23, a

> [p]roposal exists at the stage in the development of an action when an agency ... has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects [of the proposed action] can be meaningfully evaluated.

After carefully reviewing the Preservation Program as set forth in the FWS's Concept Plan document (AR. B), the Court finds that the Preservation Program is not a "proposal" for major federal action under NEPA.

The plaintiffs characterize the Concept Plan document as a proposal for a series of land acquisitions by the FWS. The alleged effect of this proposal is, once again, the "elimination" of potential reservoir sites. As the Court discussed earlier at length, such effects are not within the scope of NEPA because of the absence of any causal

connection between acquisition of conservation easements and any changes in the physical environment. For this reason alone, the plaintiffs can not maintain a NEPA claim concerning the Preservation (*403) Program. Additionally, a plain reading of the Concept Plan demonstrates that it is nothing more than a preliminary study document that the FWS intends to use as a basis for making specific proposals for land acquisitions in the future.

The FWS's guidelines concerning land acquisitions explain that a concept plan such as the one prepared for the Preservation Program is only a preliminary step in the FWS's decision making process concerning land acquisitions. (FWS Realty Manual, 2 REM 2.10-11).[9] Even after a concept plan is prepared, land acquisitions may be rejected

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[9] Appendix 6, Federal Defendants' Motion for Summary Judgment.

after the FWS conducts further study and planning. *Id.* It is only after such further study and planning that the FWS prepares a "decision document" concerning a specific proposal for land acquisition, and the guidelines provide that such decision documents shall be prepared in accordance with NEPA. Thus, the Preservation Program Concept Plan is not a "proposal" under NEPA, and the statements contained in the Preservation Program Concept Plan support this conclusion.

The majority of the Preservation Program Concept Plan document is simply informational in nature. The Concept Plan contains an extensive discussion of the types of flora and fauna found in bottomlands habitat. (AR. B, pp. 29- 82). There is also an extensive review of the natural resources and socio- economic features of the East Texas area encompassing bottomlands

habitat. (AR. B, pp. 83-123). The statements contained in the document that relate directly to acquisition of bottomlands habitat show that the Concept Plan does not contain a "proposal" for land acquisitions.

> In the Concept Plan, the FWS states that [t]he purpose of this program is to *identify and seek methods for preserving* as much of the remaining bottomlands habitats of east Texas as possible . . . A total of 62 areas of widely varying quality have been identified . . . *Not all of these sites are being recommended for preservation, and other areas may be listed as additional information becomes available.*

(AR. B, p. 4).

The Concept Plan also recites that "[a] stated acreage and policy objective for [preserving] bottomlands in Texas is very difficult, *because of the infancy of the*

program and the complexity of the biological and sociological factors involved." (AR. B, pp. 3-4). Although the Concept Plan divides areas of bottomlands habitat into six priority groups, the Concept Plan specifies that the categories may be subsequently reviewed and revised by the FWS and other parties. (AR. B, p. 22). Finally, the FWS states in the Concept Plan that it has only a "minimal amount" of information concerning the owners of lands that encompass bottomlands habitat, and that only after the FWS contacts landowners will a "detailed preservation plan" be prepared for a specific site. (AR. B, p. 22).

These statements belie the plaintiffs' assertion that the Concept Plan is a "proposal" for federal action. The Concept Plan does not identify which sites will be acquired by the FWS, nor does it identify which of the various suggested alternative

methods of preservation might be used to acquire any particular site or category of sites. Thus, there are no discernible "effects" of any particular acquisition or series of acquisitions that can be meaningfully evaluated under NEPA. Accordingly, the Court finds that the FWS was not required to prepare an EIS concerning the Preservation Program, since the Program is not a "proposal" for major federal action.

VI. NO VIOLATION OF 16 U.S.C. § 460k OR § 742a

[15] In its Original Complaint, SRA alleged that the terms of the easement restricting public access to the Club's property violated provisions of the Fish and Wildlife Act, 16 U.S.C. § 742a, and the Refuge Recreation Act, 16 U.S.C. § 460k. Not only do these statutes fail to provide any basis for SRA's claims, these statutes

specifically authorize the FWS's action in this case.

(*404)

The Fish and Wildlife Act provides in part that

> The Secretary of the Interior is authorized to accept any gifts, devises, or bequests of real or personal property ... for the benefit of the United States Fish and Wildlife Service ... Such acceptance may be subject to the terms of any restrictive or affirmative covenant, or condition of servitude, *if such terms are deemed by the Secretary to be in accordance with law and compatible with the purpose for which acceptance is sought*.

16 U.S.C. § 742f(b)(1).

The Refuge Recreation Act grants the Secretary similar discretion to permit or restrict public use of refuge areas, and to accept donations of real property under

such restrictions as the *Secretary may deem to be compatible with the purposes of the refuge areas.* 16 U.S.C. § 460k. SRA has failed to demonstrate that the FWS's acceptance of the easement under terms restricting the public's access to what remains privately owned land was unreasonable, arbitrary or capricious.

VII. SUMMARY

For the foregoing reasons, the Court finds that (1) the FWS's FONSI concerning the acquisition of the conservation easement is correct because there is "no reasonable possibility" that the FWS's action will cause "a significant degradation of some human environmental factor" through a change in the physical environment; (2) the alleged effect of the FWS's action--"elimination of a potential reservoir site"--is not within the scope of NEPA because there is no causal relationship be-

tween the alleged effect and any change in the physical environment caused by the acquisition of the easement; (3) the plaintiffs lack standing under NEPA to challenge the FWS's acquisition of the easement; (4) the EA prepared by the FWS was adequate; (5) NEPA does not require the FWS to prepare an EIS concerning its Preservation Program, as set forth in the Concept Plan, because the Program is not a "proposal" for a major federal action; and (6) the FWS did not violate the Fish and Wildlife Act or the Refuge Recreation Act by agreeing to accept the easement under terms that restrict the public's access to the Club's property. Therefore, it is

ORDERED the Motions for Summary Judgment filed by the plaintiff Sabine River Authority and plaintiff-intervenor Texas Water Conservation Association are DENIED. It is further

ORDERED the Motions for Summary Judgment filed by the defendants United States Department of Interior and United States Fish and Wildlife Service, Little Sandy Hunting and Fishing Club, and defendant-intervenors Sierra Club and National Audubon Society are GRANTED, and all of the plaintiffs' claims against all of the defendants are DISMISSED WITH PREJUDICE.

APPENDIX A
United States District Court
August 13, 1990

APPENDIX A

United States Department of Interior

FISH AND WILDLIFE SERVICE
POST OFFICE BOX 1306
ALBUQUERQUE, N.M. 87103

DEC 12, 1986

FINDING OF NO SIGNIFICANT IMPACT
(FONSI)

TO ALL INTERESTED GOVERNMENTAL AGENCIES AND PUBLIC GROUPS

Based on a review and evaluation of the information contained in the references enumerated below, I have determined that acceptance of a perpetual non-development easement donation, covering 3,802 acres of privately-owned land in Wood County, Texas, for the benefit of migratory waterfowl and other wildlife, is not a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(c) of the National Environmental Policy Act of 1969.

Accordingly, the preparation of an Environmental Impact Statement on the proposed action is not required.

Supporting References

An Environmental Assessment, Texas Bottomland Hardwood Preservation Program Concept Plan and a Bottomland Hardwoods Land Protection Plan have been prepared and summarize the environmental impacts and the reason why a statement is not required. These documents are on file at this office and are available for public inspection upon request.

/s/ M. J. Spear
Regional Director

U.S. COURT OF APPEALS
FILED
MAR 4 1992
GILBERT F. GANUCHEAU
CLERK

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 90-4761

SABINE RIVER AUTHORITY,
Plaintiff-Appellant,
and
TEXAS WATER CONSERVATION ASSOCIATION,
Plaintiff-Intervenor-Appellant,

versus

U. S. DEPARTMENT OF INTERIOR,
et al., Defendants-Appellees,
and
THE SIERRA CLUB and
THE NATIONAL AUDUBON, SOCIETY
Defendants-Intervenors-Appellees

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
TEXAS**

APPENDIX A
5th Circuit Court
March 4, 1992

ON PETITION FOR REHEARING

(March 4, 1992)

Before GOLDBERG, GARWOOD, Circuit Judges and BUCHMEYER* , District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Irving L. Goldberg
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES FOR STAY OF THE MANDATE

---

* District Judge for the Northern District of Texas, sitting by designation.

APPENDIX A
5th Circuit Court
March 4, 1992

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.
and

THE SIERRA CLUB AND THE NATIONAL AUDUBON SOCIETY, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

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APPENDIX B

16 U.S.C. § 460k (1974)

NATIONAL CONSERVATION RECREATIONAL AREAS

§ 460k. Public recreation use of fish and wildlife conservation areas; compatibility with conservation purposes; appropriate incidental or secondary use; consistency with other Federal operations and primary objectives of particular areas; curtailment; forms of recreation not directly related to primary purposes of individual areas; repeal or amendment of provisions for particular areas.

In recognition of mounting public demands for recreational opportunities on areas within the National Wildlife Refuge System, national fish hatcheries, and other conservation areas administered by the Secretary

of the Interior for fish and wildlife purposes; and in recognition also of the resulting imperative need, if such recreational opportunities are provided, to assure that any present or future recreational use will be compatible with, and will not prevent accomplishment of, the primary purposes for which the said conservation areas were acquired or established, the Secretary of the Interior is authorized, as an appropriate incidental or secondary use, to administer such areas or parts thereof for public recreation when in his judgment public recreation can be an appropriate incidental or secondary use: *Provided*, That such public recreation use shall be permitted only to the extent that is practicable and not inconsistent with other previously authorized Federal operations or with the primary objectives for which each particular area is established:

Provided further, That in order to insure accomplishment of such primary objectives, the Secretary, after consideration of all authorized uses, purposes, and other pertinent factors relating to individual areas, shall curtail public recreation use generally or certain types of public recreation use within individual areas or in portions thereof whenever he considers such action to be necessary: *And provided further*, That none of the aforesaid refuges, hatcheries, game ranges, and other conservation areas shall be used during any fiscal year for those forms of recreation that are not directly related to the primary purposes and functions of the individual areas until the Secretary shall have determined--

(a) that such recreational use will not interfere with the primary purposes for which the areas were established, and

(b) that funds are available for the development, operation, and maintenance of these permitted forms of recreation. This section shall not be construed to repeal or amend previous enactments relating to particular areas.

(Pub.L. 87-714, § 1, Sept. 28, 1962, 76 Stat. 653; Pub.L. 89-669, § 9, Oct. 15, 1966, 80 Stat. 930.)

APPENDIX B

16 U.S.C. § 668dd (1985)

§ 668dd. National Wildlife Refuge System

(a) Designation; administration; continuance of resources-management-programs for refuge lands in Alaska; disposal of acquired lands; proceeds

(1) For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary of the Interior for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas are

hereby designated as the "National Wildlife Refuge System" (referred to herein as the "System"), which shall be subject to the provisions of this section, and shall be administered by the Secretary through the United States Fish and Wildlife Service. With respect to refuge lands in the State of Alaska, those programs relating to the management of resources for which any other agency of the Federal Government exercises administrative responsibility through cooperative agreement shall remain in effect, subject to the direct supervision of the United States Fish and Wildlife Service, as long as such agency agrees to exercise such responsibility.

(2) No acquired lands which are or become a part of the System may be transferred or otherwise disposed of under any provision of law (except by exchange pursuant to subsection (b) (3) of this section) unless-

(A) the Secretary of the Interior determines with the approval of the Migratory Bird Conservation Commission that such lands are no longer needed for the purposes for which the System was established; and

(B) such lands are transferred or otherwise disposed of for an amount not less than--

(i) the acquisition costs of such lands, in the case of lands of the System which were purchased by the United States with funds from the migratory bird conservation fund, or fair market value, whichever is greater; or

(ii) the fair market value of such lands (as determined by the Secretary as of the date of the transfer or disposal), in the case of lands of the

System which were donated to the System.

The Secretary shall pay into the migratory bird conservation fund the aggregate amount of the proceeds of any transfer or disposal referred to in the preceding sentence.

(3) Each area which is included within the System on January 1, 1975, or thereafter, and which was or is--

(A) designated as an area within such System by law, Executive order, or secretarial order; or

(B) so included by public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any State or local government, any Federal department or agency, or any other governmental entity,

shall continue to be a part of the System until otherwise specified by Act of

Congress, except that nothing in this paragraph shall be construed as precluding-

(i) the transfer or disposal of acquired lands within any such area pursuant to paragraph (2) of this subsection;

(ii) the exchange of lands within any such area pursuant to subsection (b) (3) of this section; or

(iii) the disposal of any lands within any such area pursuant to the terms of any cooperative agreement referred to in subparagraph (B) of this paragraph.

(b) Administration; public accommodations con-tracts; acceptance and use of funds; exchange of properties; cash equalization payments

In administering the System, the Secretary is authorized--

(1) to enter into contracts with any person or public or private agency through negotiation for the provision of public accommodations when, and in such locations, and to the extent that the Secretary determines will not be inconsistent with the primary purpose for which ~~the~~ affected area was established.

(2) to accept donations of funds and to use such funds to acquire or manage lands or interests therein, and

(3) to acquire lands or interests therein by exchange (A) for acquired lands or public lands, or for interests in acquired or public lands, under his jurisdiction which he finds to be suitable for disposition, or (B) for the right to remove, in accordance with such terms and conditions as he may prescribe, products from the acquired or public lands within the System. The values of

the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.

(c) Prohibited and permitted activities; application of mining and mineral leasing laws, hunting or fishing regulations, and State laws or regulations

No person shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System; or take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any such area; or enter, use, or otherwise occupy any such area for any purpose; unless such activi-

ties are performed by persons authorized to manage such area, or unless such activities are permitted either under subsection (d) of this section or by express provision of the law, proclamation, Executive order, or public land order establishing the area, or amendment thereof: *Provided*, That the United States mining and mineral leasing laws shall continue to apply to any lands within the System to the same extent they apply prior to October 15, 1966, unless subsequently withdrawn under other authority of law. With the exception of endangered species and threatened species listed by the Secretary pursuant to section 1533 of this title in States wherein a cooperative agreement does not exist pursuant to section 1535(c) of this title, nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and

wildlife on lands not within the system. The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations. The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.

(d) Use of areas; administration of migratory bird sanctuaries as game taking areas; rights of way, easements, and reservations; payment of fair market value

(1) The Secretary is authorized, under such regulations as he may prescribe, to--

(A) permit the use of any area within the System for any purpose, in-

cluding but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established: Provided, That not to exceed 40 per centum at any one time of any area that has been, or hereafter may be acquired, reserved, or set apart as an inviolate sanctuary for migratory birds, under any law, proclamation, Executive order, or public land order may be administered by the Secretary as an area within which the taking of migratory game birds may be permitted under such regulations as he may prescribe unless the Secretary finds that the taking of any species of migratory game birds in more than 40 percent of such area would be beneficial to the species; and

(B) permit the use of, or grant easements in, over, across, upon, through, or under any areas within the System for purposes such as but not necessarily limited to, powerlines, telephone lines, canals, ditches, pipelines, and roads, including the construction, operation, and maintenance thereof, whenever he determines that such uses are compatible with the purposes for which these areas are established.

(2) Notwithstanding any other provision of law, the Secretary of the Interior may not grant to any Federal, State, or local agency or to any private individual or organization any right-of-way, easement, or reservation in, over, across, through, or under any area within the system in connection with any use permitted by him under paragraph (1) (B) of this subsection unless the grantee pays to the Secretary, at the

option of the Secretary, either (A) in lump sum the fair market value (determined by the Secretary as of the date of conveyance to the grantee) of the right-of-way, easement, or reservation; or (B) annually in advance the fair market rental value (determined by the Secretary) of the right-of-way, easement, or reservation. If any Federal, State, or local agency is exempted from such payment by any other provision of Federal law, such agency shall otherwise compensate the Secretary by any other means agreeable to the Secretary, including, but not limited to, making other land available or the loan of equipment or personnel; except that (A) any such compensation shall relate to, and be consistent with, the objectives of the National Wildlife Refuge System, and (B) the Secretary may waive such requirement for compensation if he finds such requirement impracticable or un-

necessary. All sums received by the Secretary of the Interior pursuant to this paragraph shall, after payment of any necessary expenses incurred by him in administering this paragraph, be deposited into the Migratory Bird Conservation Fund and shall be available to carry out the provisions for land acquisition of the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.) and the Migratory Bird Hunting Stamp Act (16 U.S.C. 718 et seq.).

(e) Penalties

Any person who violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder shall be fined under Title 18, or imprisoned for not more than 1 year, or both.

(f) Enforcement of provisions; arrest, searches, and seizures; custody of property; forfeitures; disposition

Any person authorized by the Secretary of the Interior to enforce the provisions of this Act or any regulations issued thereunder, may, without a warrant, arrest any person violating this Act or regulations in his presence or view, and may execute any warrant or other process issued by an officer or court of competent jurisdiction to enforce the provisions of this Act or regulations, and may with a search warrant search for and seize any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof, taken or possessed in violation of this Act or the regulations issued thereunder. Any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or egg thereof seized with or without a search warrant shall be held by such person or by a United States marshal, and upon conviction, shall be forfeited to

the United States and disposed of by the Secretary, in accordance with law. The Director of the United States Fish and Wildlife Service is authorized to utilize by agreement, with or without reimbursement, the personnel and services of any other Federal or State agency for purposes of enhancing the enforcement of this Act.

(g) Regulations; continuation, modification, or rescission

Regulations applicable to areas of the System that are in effect on October 15, 1966, shall continue in effect until modified or rescinded.

(h) National conservation recreational area provisions; amendment, repeal, or modification

Nothing in this section shall be construed to amend, repeal, or otherwise modify the provision of the Act of September 28, 1962 (76 Stat. 653; 16 U.S.C. 460k-

460k-4) which authorizes the Secretary of the Interior to administer the areas within the System for public recreation. The provisions of this section relating to recreation shall be administered in accordance with the provisions of said sections.

(i) Exemption from State water laws

Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(Pub.L. 89-669, § 4, Oct. 15, 1966, 80 Stat. 927; Pub.L. 90-404, § 1, July 18, 1968, 82 Stat. 359; Pub.L. 93-205, § 13(a), Dec. 28, 1973, 87 Stat. 902; Pub.L. 93-509, § 2, Dec. 3, 1974, 88 Stat. 1603; Pub.L. 94-215, § 5, Feb. 17, 1976, 90 Stat. 190; Pub.L. 94-223, Feb. 27, 1976, 90 Stat. 199; Pub.L. 95- 616, §§ 3(f), 6, Nov. 8, 1978, 92 Stat. 3111, 3114.) (As amended Pub.L. 100-226, § 4, Dec. 31, 1987,

101 Stat. 1551; Pub.L. 100- 653, Title IX, § 904, Nov. 14, 1988, 102 Stat. 3834.)

APPENDIX B

28 U.S.C. § 1254 (Supp. 1992)

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the

entire record to be sent up for decision of the entire matter in controversy.

(As amended June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

APPENDIX B

33 U.S.C. § 1371 (1976)

§ 1371. Authority under other laws and regulations

(a) Impairment of authority or functions of officials and agencies; treaty provisions

This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899 (30 Stat. 1112); except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 403 of this title, or (3) affecting or impairing the

provisions of any treaty of the United States.

(b) Discharges of pollutants into navigable waters

Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441-451b) shall be regulated pursuant to this chapter, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

(c) Action of Administrator deemed major Federal action; construction of National Environmental Policy Act of 1969

(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section

1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C.A. s 4321 et seq.]; and

(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to--

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy

of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

(d) Consideration of international water pollution control agreements

Notwithstanding this chapter or any other provision of law, the Administrator (1) shall not require any State to consider in the development of the ranking in order of priority of needs for the construction of treatment works (as defined in subchapter II of this chapter), any water pollution control agreement which may have been entered into between the United States and any other nation, and (2) shall not con-

sider any such agreement in the approval of any such priority ranking.

(June 30, 1948, c. 758, Title V, s 511, as added Oct. 18, 1972, Pub.L. 92- 500, s 2, 86 Stat. 893, and amended Jan. 2, 1974, Pub.L. 93-243, s 3, 87 Stat. 1069.)

APPENDIX B

42 U.S.C. § 4331 (1977)

§ 4331. Congressional declaration of national environmental policy

Creation and maintenance of conditions under which man and nature can exist in productive harmony

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public

and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal

plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit

high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Responsibility of each person to contribute to preservation and enhancement of environment

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub.L. 91-190, Title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

APPENDIX B

42 U.S.C. § 4332 (1977)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the

Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the pub-

lic as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reasons of having been prepared by a State agency or official, if:

(i) the State agency of official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of

statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information use-

[1] So in original.

ful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 State. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.

APPENDIX B

EXCERPTS FROM
40 C.F.R. Part 1501 (1986)

PART 1501:--NEPA AND AGENCY PLANNING

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

* * * *

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to

head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves

unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

* * * *

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition to any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with

jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall including such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

* * * *

APPENDIX B

EXCERPTS FROM
40 CFR Part 1502 (1986)

PART 1502:--ENVIRONMENTAL IMPACT STATEMENT

AUTHORITY: NEPA, the Environmental Quality Improve-ment Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

* * * *

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to

be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encourage to begin preparation of such assessments or

statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

APPENDIX B

EXCERPTS FROM
40 C.F.R. Part 1508 (1986)

PART 1508:--TERMINOLOGY AND INDEX

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

* * * *

§ 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the

quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

* * * *

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

* * * *

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, struc-

tures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

* * * *

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statements . When an environmental impact statement is prepared and economic or so-

cial and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

* * * *

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as acency action.

(a) Actions include new and continuing activities, including projects and programs

entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following catagories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*;

treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographical area. Projects include actions approved by permit

or other regulatory decision as well as federal and federally assisted activities.

* * * *

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statemment may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

* * * *

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of the action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geogrpahic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with

significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been deter-

mined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.
and

THE SIERRA CLUB AND THE NATIONAL AUDUBON SOCIETY, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

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APPENDIX C

TEXAS CONSTITUTION, art. III, § 49-d (1984)

§ 49-d. Acquisition and development of water storage facilities; filtration, treatment and transportation of water; enlargement of reservoirs

Sec. 49-d. It is hereby declared to be the policy of the State of Texas to encourage the optimum development of the limited number of feasible sites available for the construction or enlargement of dams and reservoirs for conservation of the public waters of the state, which waters are held in trust for the use and benefit of the public. The proceeds from the sale of the additional bonds authorized hereunder deposited in the Texas Water Development Fund and the proceeds of bonds previously authorized by Article III, Section 49-c of this Constitution, may be used by the Texas

Water Development Board, under such provisions as the Legislature may prescribe by General Law, including the requirement of a permit for storage or beneficial use, for the additional purposes of acquiring and developing storage facilities, and any system or works necessary for the filtration, treatment and transportation of water from storage to points of treatment, filtration and/or distribution, including facilities for transporting water therefrom to wholesale purchasers, or for any one or more of such purposes or methods; provided, however, the Texas Water Development Fund or any other state fund provided for water development, transmission, transfer or filtration shall not be used to finance any project which contemplates or results in the removal from the basin of origin of any surface water necessary to supply the reasonably foreseeable future water require-

ments for the next ensuing fifty-year period within the river basin of origin, except on a temporary, interim basis.

Under such provisions as the Legislature may prescribe by General Law the Texas Water Development Fund may be used for the conservation and development of water for useful purposes by construction or reconstruction or enlargement of reservoirs constructed or to be constructed or enlarged within the State of Texas or on any stream constituting a boundary of the State of Texas, together with any system or works necessary for the filtration, treatment and/or transportation of water, by any one or more of the following governmental agencies: by the United States of America or any agency, department or instrumentality thereof; by the State of Texas or any agency, department or instrumentality thereof; by political subdivisions or bod-

ies politic and corporate of the state; by interstate compact commissions to which the State of Texas is a party; and by municipal corporations. The Legislature shall provide terms and conditions under which the Texas Water Development Board may sell, transfer or lease, in whole or in part, any reservoir and associated system or works which the Texas Water Development Board has financed in whole or in part.

Under such provisions as the Legislature may prescribe by General Law, the Texas Water Development Board may also execute long-term contracts with the United States or any of its agencies for the acquisition and development of storage facilities in reservoirs constructed or to be constructed by the Federal Government. Such contracts when executed shall constitute general obligations of the State of Texas in the same manner and with the same effect as

state bonds issued under the authority of the preceding Section 49-c of this Constitution, and the provisions in said Section 49-c with respect to payment of principal and interest on state bonds issued shall likewise apply with respect to payment of principal and interest required to be paid by such contracts. If storage facilities are required for a term of years, such contracts shall contain provisions for renewal that will protect the state's investment.

The aggregate of the bonds authorized hereunder shall not exceed $200,000,000 and shall be in addition to the aggregate of the bonds previously authorized by said Section 49-c of Article III of this Constitution. The Legislature upon two-thirds (2/3) vote of the elected members of each House, may authorize the Board to is-

sue all or any portion of such $200,000,000 in additional bonds herein authorized.

The Legislature shall provide terms and conditions for the Texas Water Development Board to sell, transfer or lease, in whole or in part, any acquired storage facilities or the right to use such storage facilities together with any associated system or works necessary for the filtration, treatment or transportation of water at a price not less than the direct cost of the Board in acquiring same; and the Legislature may provide terms and conditions for the Board to sell any unappropriated public waters of the state that might be stored in such facilities. As a prerequisite to the purchase of such storage or water, the applicant therefor shall have secured a valid permit from the Texas Water Commission or its successor authorizing the acquisition of such storage facilities or the water im-

pounded therein. The money received from any sale, transfer or lease of storage facilities or associated system or works shall be used to pay principal and interest on state bonds issued or contractual obligations incurred by the Texas Water Development Board, provided that when moneys are sufficient to pay the full amount of indebtedness then outstanding and the full amount of interest to accrue thereon, any further sums received from the sale, transfer or lease of such storage facilities or associated system or works may be used for the acquisition of additional storage facilities or associated system or works or for providing financial assistance as authorized by said Section 49-c. Money received from the sale of water, which shall include standby service, may be used for the operation and maintenance of ac-

quired facilities, and for the payment of principal and interest on debt incurred.

Should the Legislature enact enabling laws in anticipation of the adoption of this Amendment, such Acts shall not be void by reason of their anticipatory character. Adopted Nov. 6, 1962. Amended Nov. 8, 1966.

APPENDIX C

TEXAS WATER CODE ANNOTATED § 15.004 (1988)

Water Development
Water Assistance Program

§ 15.004. Transbasin Diversion

Money on deposit in a fund created under Article III, Section 49-d-3, of the Texas Constitution shall not be used to finance or in aid of any project under this chapter that contemplates or results in the removal from the basin of origin of any surface water necessary to supply the reasonably foreseeable future water requirements for the next ensuing 50-year period within the river basin of origin, except on a temporary, interim basis.

Added by Acts 1981, 67th Leg., 1st C.S., p. 102, ch. 12, § 1, eff. Nov. 10, 1981. Amended by Acts 1985, 69th Leg., ch. 133, § 2.03.

APPENDIX C

TEXAS WATER CODE ANN. § 16.051 (1988)
Water Development - Planning

§ 16.051. State Water Plan

(a) The executive administrator shall prepare, develop, and formulate a comprehensive state water plan.

(b) The plan shall define and designate river basins and watersheds as separate units for the purpose of water development and interwatershed transfers.

(c) The executive administrator shall be governed in his preparation of the plan by a regard for the public interest of the entire state. The executive administrator shall direct his efforts toward the orderly development and management of water resources in order that sufficient water will be available at a reasonable cost to further the economic development of the entire state.

(d) The executive administrator shall also give consideration in the plan to the effect of upstream development on the bays, estuaries, and arms of the Gulf of Mexico and to the effect of the plan on navigation.

Amended by Acts 1977, 65th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977; Acts 1985, 69th Leg., ch. 795, § 1.046, eff. Sept. 1, 1985.

APPENDIX C

Texas Water Code § 16.052 (1988)

Water Development
Water Assistance Program

§ 16.052. Interbasin Water Transfer

The executive administrator shall not prepare or formulate a plan which contemplates or results in the removal of surface water from the river basin of origin if the water supply involved will be required for reasonable foreseeable water supply requirements within the river basin or origin during the next ensuing 50-year period, except on a temporary, interim basis.

Amended by Acts 1977, 6th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977; Acts 1985, 69th Leg., ch. 795, § 1.047, eff. Sept. 1, 1985.

APPENDIX C

FISH & WILDLIFE SERVICES (Prodedural Manual)
NEPA HANDBOOK - INTRA-SERVICE PLANNING AND DOCUMENTATION (excerpt)

3.9 NEPA Procedural Requirements

A. Phase 1: Determination of the Type of NEPA Documentation Required (Exhibit 2).

The basic question under NEPA is: "Is the action a major Federal action having a significant impact on the quality of the human environment?" If the answer is yes, then an Environmental Impact Statement (EIS) is required. Any action with significant effects is considered a major Federal action for purposes of NEPA compliance. If the action is a categorical exclusion, then no documentation is required. On all other actions, an Environmental Assessment (EA) must be prepared to help determine whether there should be an EIS. After completion of an EA, if it is determined that an EIS

is not required, a Finding of No Significant Impact (FONSI) will be prepared. If there is no question that an EIS must be prepared, the EA step may be bypassed and the EIS process may be started directly.

(1) Categorical Exclusions. Actions listed in 516 DM 2 Appendix 1 and 516 DM 6 Appendix 1 (30 AM 2 Exhibit 4) have been determined not to affect the quality of the human environment individually or cumulatively and, therefore, they do not normally require preparation of either an EA or EIS. If circumstances exist in which a normally excluded action may result in significant effects upon the environment an EA or EIS must b e prepared. In addition, an EA may be prepared if it is determined that such preparation would: aid in planning or decisionmaking serve as a vehicle to gain

public input or facilitate interagency coordination, simplify permit approval, or gain other necessary legal clearances.

(2) EIS Required. Potential FWS actions which always require the completion of an EIS prior to their implementation are listed in 516 DM 6 Appendix 1. As with the categorical exclusions, circumstances may exist in which an action normally requiring the preparation of an EIS would not require one. In such circumstances, a field office shall prepare a statement explaining why the particular action in question does not require preparation of an EIS and forward this to the decisionmaker identified in 4 AM 4. This statement normally would be in the form of an EA plus other supporting information.

(3) Environmental Assessment Required. If an action is not categorically excluded

or listed as requiring an EIS, an EA must be prepared unless a decision has been made to proceed directly with preparation of an EIS. A purpose of the EA is to help determine if the action will have significant effects. If the EA shows there are significant effects, an EIS must be prepared. The major decision points normally requiring an EIS are listed in 516 DM 6 Appendix 1.

B. Phase 2: The Documentation Process (Exhibit 3). As explained above, three different determinations of need for NEPA documentation can be made (i.e., action is categorically excluded, EA is required, or EIS is required). This section reflects those three options.

(1) Actions Categorically Excluded. If this determination is made, the action may be implemented immediately; no NEPA docu-

mentation is required, nor is there a requirement to record this decision for all actions. However, for convenience and for reference purposes it may be desirable to prepare a brief paragraph for the administrative record stating that the action was examined from a NEPA standpoint and was found to be a categorically excluded type of action. Both the Department of the Interior (DOI) and FWS have established lists of categorically excluded actions; see 516 DM 2 Appendix 1 and 516 DM 6 Appendix 1 (included as Exhibit 4 of 30 AM 2 of this Handbook).

* * * *

(3) EA Required - Prepare EA. If the action is not categorically excluded or certain to be covered by an EIS, the preparation of an EA should begin immediately. The substantive requirements of EA prepara-

tion are described in 30 AM 3.10A. As mentioned earlier, an EA can serve a variety of purposes in addition to its primary legal purpose of assisting in determination of need to prepare an EIS. Nothing precludes FWS from utilizing the EA as a tool for public participation or interagency coordination, assisting in securing permits or other legal clearances, or aiding planning and decisionmaking. These other purposes (e.g., planning) may make the EA more comprehensive in what it includes beyond what is necessary for the EIS or no-EIS determination.

(a) Distribute EA for Review and Comment. For actions proposed to occur in a wetland or 100-year floodplain, circulation of EA's is required (See 30 AM 11).

(i) Interested and affected public entities shall be notified by notice in the

Federal Register or other appropriate medium that an EA has been prepared and is available for review. Use of an EA in this manner can have several benefits. Comments received may reveal different alternative means to accomplish stated purpose, yet with reduced environmental harm. New mitigative measures to offset adverse effects may be noted. Additionally, groups or individuals may offer assistance or support in implementing an action. The public review and comment process also provides an indication of the degree of public controversy surrounding an issue; if a determination is made not to pursue preparation of an EIS, a written record of public comment supports such a judgment.

(b) Finalize EA. Comments made during in-house review (or by the public or other agencies if EA was distributed outside FWS)

must be considered in revising the EA to define alternatives further, including the proposed action, and for better assessment of effects. Feasible mitigative measures will be identified during review of the draft EA in accordance with the FWS Mitigation Policy (see 30 AM 4 Exhibit 2), and will be made part of the proposed action.

(c) Determine if the Preferred Alternative Constitutes a Major Action Significantly Affecting the Quality of the Human Environment. The EA shall serve as the basis for determining whether implementation of the proposed action would constitute a major Federal action significantly affecting the quality of the human environment. This determination is the second major decision point in the NEPA process. If a positive finding is made, an EIS is re-

quired. If a negative finding is made, a FONSI must be prepared and signed. Either finding will be based on information presented in the text of the EA and the text of the EA should provide sufficient factual material to support the finding.

(i) Determinations of major Federal actions and significant effects upon the human environment are subject to variable interpretation, and no hard-and-fast rules are available to label an action conclusively one way or the other. The necessity for preparing an EIS is a matter of professional judgment requiring consideration of all issues in question, including information documented in the EA. The suggested criteria below are developed from review of legal opinions rendered during the past several years and from guidance provided by CEQ in 40 CFR 1508.18 and 1508.27.

(d) Criteria To Assist In Determination Of The Need To Prepare An EIS. The following criteria should be used in evaluating proposed actions which may require an EIS. It is important to be as objective as possible when making these determinations. One or more of the following, depending on the severity of effects, may trigger the preparation of an EIS to assure that adequate information is available before decisions are made.

(i) Controversial environmental effects.

(ii) Change in FWS policy having a significant environmental effect.

(iii) Precedent-setting actions with wide-reaching or long-term implications (e.g., special use permits for off-road vehicles, mineral extraction, energy facility development).

(iv) Obligation of future generations to large monetary debts or to social or technological solutions to problems now considered insurmountable.

(v) Major alterations in natural environmental quality, either exceeding local, regional, State, or Federal environmental standards, or exposing existing or future generations to increased safety or health hazards.

(vi) Conflicts with proposed or adopted local, regional, State, interstate, or Federal land use plans or policies.

(vii) Adverse effects on designated or proposed natural or recreation areas (e.g., wilderness areas, parks, research natural areas, wild and scenic rivers, estuarine sanctuaries, national recreation areas, critical habitat, or wetlands).

(viii) Degradation of important aesthetic resources.

(ix) Removal from production of prime or unique farmland as designated by local, regional, State, or Federal authorities.

(x) Major geologic, hydrologic, or meteorologic changes.

(xi) Construction or other activities within an area of significant geologic or hydrologic hazard (e.g., within a major earthquake zone, an area that is landslide prone, or a 100-year floodplain).

(xii) Major effects on a domestic water supply, or a major consumptive or long-term commitment to water use.

(xiii) Major consumptive or long-term commitments to sue of energy or nonrenewable resources, especially those of non-local origin or in short supply.

(xiv) Major effects on energy sources, existing or potential (e.g., oil, gas, coal, uranium, geothermal, or hydropower resources).

(xv) Condemnation of property rights or fee title to land, and/or large-scale relocation of people, homes, commercial, industrial, or major public facilities.

(3) Prepare Finding of No Significant Impact (40 CFR 1508.13). If it is determined that implementation of a proposed action would not constitute a major Federal action significantly affecting the quality of the human environment, FONSI, explaining the rationale for such finding and stating that an EIS will not be prepared, shall be prepared and signed by the RD and made available to all interested parties for public review. A FONSI must be made available to the public in accordance with 40

CFR 1506.6. An example of a FONSI is found in Exhibit 4.

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3.9B(2)

(d) Criteria To Assist In Determination Of The Need To Prepare An EIS. The following criteria should be used in evaluating proposed actions which may require an EIS. It is important to be as objective as possible when making these determinations. One or more of the following, depending on the severity of effects, may trigger the preparation of an EIS to assure that adequate information is available before decisions are made.

(i) Controversial environmental effects.

(ii) Change in FWS policy having a significant environmental effect.

(iii) Precedent-setting actions with wide-reaching or long-term implications

(e.g., special use permits for off-road vehicles, mineral extraction, energy facility development).

(iv) Obligation of future generations to large monetary debts or to social or technological solutions to problems now considered insurmountable.

(v) Major alterations in natural environmental quality, either exceeding local, regional, Sate, or Federal environmental standards, or exposing existing or future generations to increased safety or health hazards.

(vi) Conflicts with proposed or adopted local, regional, State, interstate, or Federal land use plans or policies.

(vii) Adverse effects on designated or proposed natural or recreation areas (e.g., wilderness areas, parks, research natural areas, wild and scenic rivers, estuarine

sanctuaries, national recreation areas, critical habitat, or wetlands).

(viii) Degradation of important aesthetic resources.

(ix) Removal from production of prime or unique farmland as designated by local, regional, State, or Federal authorities.

(x) Major geologic, hydrologic, or meteorologic changes.

(xi) Construction or other activities within an area of significant geologic or hydrologic hazard (e.g., within a major earthquake zone, an area that is landslide prone, or a 100-year floodplain).

(xii) Major effects on a domestic water supply, or a major consumptive or long-term commitment to water use.

(xiii) Major consumptive or long-term commitments to use of energy or nonrenew-

able resources, especially those of non-local origin or in short supply.

(xiv) Major effects on energy sources, existing or potential (e.g., oil, gas, coal, uranium, geothermal, or hydropower resources).

(xv) Condemnation of property rights or fee title to land, and/or large-scale relocation of people, homes, commercial, industrial, or major public facilities.

* * * *

3.10 Contents of NEPA Documentation

A. Environmental Assessments (40 CFR 1508.9 and 1501.3, and 516 DM 3.4). The primary purpose of an EA, as stated in 40 DVR 1508.9, is to aid in NEPA compliance. It determines the threshold at which an EIS must be prepared. It can also be a reiteration of the planning process in written form, and serve to encourage the organiza-

tion of the environmental information available in a manner that will facilitate decisionmaking. The EA should be completed early in the decisionmaking process, so that if it becomes apparent that the project will have significant impacts, then an EIS can be prepared early as well. If the EA reveals no significant impacts, then a FONSI is prepared and the project may be implemented.

(1) EA Contents (40 CFR 1508.9 and 516 DM 3.4). The EA will generally be 15 pages or less, using the outline shown in Exhibit 13. The EA must contain the following:

(a) Cover Sheet

(b) Purpose and Need for Action. This section documents in a few sentences the first step in the planning process. The need must be defined clearly here, in order to ensure that the proposed action and al-

ternatives address it directly. If a programmatic EIS or other program documents have been prepared previously they should be referenced but not repeated.

(c) The Proposed Action and the Alternatives. This section corresponds to the second step in the planning process. It is essential to develop a thorough definition of the proposed action. The development of alternative means to achieve the objectives identified above is critical to any planning use of the EA. It provides a basis for the choice among options available to the decisionmaker in the absence of an EIS.

(i) This step is one of the more creative, and an open mind is needed, along with advice and information from many sources. Using creative problem-solving techniques may prove to be the most helpful

method of approaching and solving the problem.

(ii) All reasonable alternatives should be initially considered (40 CFR 1502.14). However, only practicable alternatives, including no action and the proposed action, need to be discussed in detail in the EA. The alternatives should not be merely exercises done to fulfill this requirement; they should be honest attempts to find other ways to meet the objectives while reducing or eliminating any harmful impacts. The alternatives should be described in detail sufficient to permit comparison of their merits, especially if their impacts are different, e.g., in kind, location, intensity, or duration.

(iii) The fact that FWS may not have authority to implement a particular alternative is not a reason for discarding it from

consideration. Authorities can change in time, special authorization can be provided by Congress, cost or political feasibility of action taken by another agency may enhance the desirability of such an alternative, or action by another organization may prove to serve resource needs better.

(iv) The no action alternative must be discussed. This discussion may contain further information about the circumstances giving rise to the initial assessment of a need for action. However, it should contain an assessment of alternative uses of resources, as related to the proposed action.

(v) As an example of good alternative development, consider the need for protection of an area determined to have outstanding wildlife habitat values. A variety of strategies might be appropriate.

Alternatives ranging from conservation education programs, memoranda of agreement, and local property tax incentives, to the more traditional approaches of land use regulation or acquisition options such as leases, easements, or fee simple purchase could all be considered viable, depending upon local circumstances. A multi-faceted program combining several of the above-mentioned components might prove to be the most practical approach. It might require the involvement of several agencies and organizations in both planning and implementation. As land valuable to wildlife grows increasingly scarce and competition for its use becomes even more keen, such packages of alternative components may be more acceptable to government and other special interests.

(vi) A brief record should be made of those alternatives initially considered but rejected from further evaluation. The rationale for rejection of such alternatives should also be provided.

(d) Description of the Affected Environment. The "Affected Environment" section should succinctly describe the area in which the action occurs (40 CFR 1502.15). Page-sized maps of the general area and the project site help reduce superfluous verbage. Carefully selected photographs may be used as appropriate. Particular mention should be made of the presence or absence of any endangered or threatened species, cultural resources, historic, archaeological, or architectural sites, or wetlands and floodplains.

(e) Environmental Consequences. Good analysis in this section is the key to a

good EA to be used in planning. Since the purpose of preparing an EA is to help determine whether or not the project will significantly affect the human environment, all significant effects, beneficial and adverse, must be noted. Implementation of a project or alternative may generate a variety of potential effects that could include physical, biological, cultural, economic, and social elements. The key effects must be identified.

(i) In addressing the consequences of the alternatives, several points should be kept in mind. Effects should be evaluated in a professional manner for their environmental impacts. Interdisciplinary analysis should be incorporated into effects assessment. This may be provided in-house or through other agency cooperation, expertise contracted for, or structured public forums

and workshops. Analysis of effects should be thorough enough to discover any indirect or cumulative effects from each alternative.

(ii) The effects of alternatives on environmental features of special Federal legal status should be highlighted. Such features would include: threatened or endangered plant or animal special or critical habitats, wetlands, 100-year floodplains, cultural resources (e.g., historic, architectural and archaeological sites and artifacts, specially designated areas (e.g., research natural areas or wilderness areas). The relationship between short-term uses of man's environment and maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources (two categories of effects required to be considered by NEPA)

which would result from implementation of any of the alternatives, should also be identified here.

(iii) When adverse effects are noted, potential mitigative measures to reduce or eliminate such effects are to be identified. Such mitigative measures are then to be worked back into the alternatives as they are refined and finalized, in compliance with the FWS Mitigation Policy (Exhibit 2 of 30 AM 4).

(f) Consultation and Coordination with Others. This section will summarize the public participation undertaken according to 30 AM 3.9E of this chapter.

B. Finding of No Significant Impact (40 CFR 1508.13). After it has been determined by a thorough review of the EA that a proposed action will not significantly affect the human environment, a FONSI will be pre-

pared. A summary of the EA will be incorporated into the FONSI.

C. Notice of Intent (40 CFR 1508.22). The contents of the NOI are described in 40 CFR 1508.22.

D. Environment Impact Statements (40 CFR 1502.1-1502.25). The purpose of the EIS is stated clearly in 40 CFR 1502.1. The EIS aids decisionmaking by providing environmental information to decisionmakers and the public. Much of the guidance given in the previous section on EA's is applicable to EIS preparation also.

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3.10D(2)

(c) Programmatic and Generic EIS's. If possible, a programmatic or generic EIS should contain a discussion of the requirements to satisfy NEPA at the level of the individual program actions, i.e., for what

specific actions an EIS will be required. The extent to which the action was covered in a previously prepared EIS must be determined. If the comprehensive EIS adequately addressed all of the effects of the proposed action and alternatives, a further EIS may not be required. Possible uses of comprehensive EIS's are explained below:

(i) Programmatic. EIS's are generally prepared for broad Federal actions such as the adoption of new programs or regulations. They define the various programs and analyze the various policy alternatives being contemplated (not funding levels), how well each would meet the identified needs, and the general environmental effects of each. It is critical that programmatic statements be started early in program planning so that they are relevant to policy and are timed to coincide with

meaningful points in the decisionmaking process. Such programmatic EIS's make the preparation of generic and site-specific environmental documents easier by laying the groundwork of policy direction. NEPA compliance for related site-specific actions can be made easier and more useful by grouping their planning and documentation as discussed in the 40 CFR 1502.4(b) of the NEPA Regulations. For example, loosely connected actions in a given geographic area can be treated together.